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Multi-level regulation of employment security and social security systems: the contemporary implications for Cyprus

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Abstract

This research study explores the multi-level regulation of the employment security and social security systems. It applies a systems theory approach based on the understanding of reflexive law developed by Gunther Teubner and Ralf Rogowski to analyse the relationship between the regulatory systems at the international (United Nations, including the International Labour Organisation), European (Council of Europe and European Union) and domestic (Cypriot) levels. This multi-faceted study illustrates that transnational and national labour systems have conceptualized and endorsed in different ways the concept of employment security. From a flexicurity perspective, as a form of re-regulation, this thesis argues that employment security could be achieved through reflexive communication with social security systems. The thesis discusses the complexity of flexicurity and shows that employment security, which takes the meaning of swift transitions in the labour market, sometimes can converge or collide with job security, which refers to security in a specific job. In this context, this thesis argues that the budgetary considerations, as part of the austerity measures, which were agreed between the Troika (the European Commission, the European Central Bank and the International Monetary Fund) and the Government of Cyprus, tend to promote the bare notion of employability rather than focusing on employment security. This bare notion of employability, which is the commercial aspect of flexicurity, facilitates the transition from unemployment to employment, however, it does not necessarily facilitate personal transitions in the labour market (to enter, re-enter, or remain in employment of one's choosing). In this context, this thesis suggests there is a need to promote collective bargaining as a stronger form of social dialogue as a means to mediate emerging tensions and power imbalances (such as in the context of economic dismissals).

From a normative analysis, it emerges that transnational regulatory systems are more interested in human rights protections and non-discrimination rather than employment security. For example, the European Court of Human Rights has regarded dismissals as actionable under articles 8 to 11 of the European Court of Human Rights. But both the EU and the ILO have added to their normative framework prohibitions on discriminatory dismissals. The EU additionally provides detailed procedures to govern economic dismissals, while ILO Convention N.158 introduces minimum standards for job security protections. In terms of social security regulation, the ILO sets a baseline of standards for social security protection whereas the EU coordinates divergent social security systems to facilitate the freedom of movement of workers and their families in the EU labour market. The CoE endorsed contributory and non-contributory benefits in the spectrum of ECHR (article 6 ECHR and A1P1 ECHR) and the ESC/RSC (as part of the right to social security).

Nevertheless, the Cypriot legal system shows its strong capacity to self-produce its own procedures and regulate employment security and social security. This thesis illustrates that the Republic of Cyprus did not fully endorse the concept of employment security, as the Cypriot Courts adopted a favouring approach towards job security protections. Whereas, social security regulation at domestic level seems to reflect the tensions between economic budgetary interests and social security protection. In this context, this thesis suggests that employment and social security regulatory systems, despite their internal differentiation, could converge through reflexive mechanisms, such as the EES and Social OMC.

Dedication

To my beloved parents, Michael and Stella,

for their unwavering love and constant support.

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Author’s declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's Regulations and Code of Practice for Research Degree Programmes and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: Christiana Antonoudiou DATE: 20 August 2019

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List of Abbreviations

AG	Advocate-General at the CJEU
AIDS	Acquired Immune Deficiency Syndrome
ALMPs	Active Labour Market Policies
CAC	Constitutional Administrative Court of Cyprus
CCP	Collective Complaints Procedure
CCCI (in Greek: ΚΕΒΕ)	Cyprus Chamber of Commerce and Industry (In Greek: Κυπριακό Εμπορικό και Βιομηχανικό Επιμελητήριο)
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CEDAW	UN Convention on Elimination of All Discrimination against Women
CEEP	European Centre of Employers and Enterprises providing Public Services
CERD	UN Convention on the Elimination of All Forms of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the European Union
CHA (in Greek: ΠΑ.ΣΥ.ΞΕ)	Cyprus Hotel Association (in Greek: Παγκύπριος Σύνδεσμος Ξενοδόχων)
CoE	Council of Europe
COLA	Cost of Living Allowance
CRPD	UN Convention on the Rights of People with Disabilities
CSR	Country-Specific Recommendations
CSS	European Convention on Social Security by the Council of Europe
CS-SS	Committee of experts on Social Security
CJEU	Court of Justice of the European Union
DEOK (in Greek: ΔΕΟΚ)	Democratic Labour Federation of Cyprus (in Greek: Δημοκρατική Εργατική Ομοσπονδία Κύπρου)
DWA	Decent Work Agenda
EAC	Electricity Authority of Cyprus
EAP	Economic Adjustment Programme
EC	European Commission
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECSR	European Committee of Social Rights
ECSS	European Code of Social Security
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EES	European Employment Strategy
EFF	Extended Fund Facility
ELA	European Labour Authority
EP	European Parliament

ERM	European Regional Meeting of the International Labour Organization
ERM II	Exchange Rate Mechanism II
ESC	European Social Charter
ESF	European Stability Facility
ESM	European Stability Mechanism
ETOR	Economic, Technical or Organizational Reasons
ETUC	European Trade Union Confederation
EU	European Union
EUCFR	European Union's Charter of Fundamental Rights
EWS	ESM's Early Warning System
FPUEAE (ΕΠΟΠΑΗ)	Free Pancyprian Union Electricity Authority Employees (in Greek: Ελεύθερη Παγκύπρια Οργάνωση Προσωπικού Αρχής Ηλεκτρισμού)
HIV	Human Immunodeficiency Virus
HLPF	High-Level Political Forum
HRC	Human Rights Council
HRDA (in Greek: ΑΝΑΔ)	Human Resource Development Authority (in Greek: Αρχή Ανάπτυξης Ανθρώπινου Δυναμικού)
JER	Joint Employment Report
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDT	Industrial Disputes Tribunal of Cyprus
ILC	International Labour Conference
ILO	International Labour Organization
IMF	International Monetary Fund
IRC	Industrial Relations Code of Cyprus
LAB	Cypriot Labour Advisory Board
LLL	Life-Long Learning Strategies
MDGs	UN Millennium Development Goals
MEFP	Memorandum of Economic and Financial Policies
MGI	Minimum Guaranteed Income (in Greek: Ελάχιστο Εγγυημένο Εισόδημα)
MoU	Cypriot Memorandum of Understanding on Specific Economic Policy Conditionality
NGO(s)	Non-Governmental Organization(s)
NHS or GESY	National Health System of Cyprus (in Greek: Γενικό Σύστημα Υγείας)
NSR	National Social Report
NRP	National Reform Programmes
OEB	Employers and Industrialists Federation (in Greek: Ομοσπονδία Εργοδοτών και Βιομηχάνων)
OMC	Open Method of Coordination
OP-ICESCR	Optional Protocol to the United Nations Covenant on Economic, Social and Cultural Rights
PEO	Pancyprian Federation of Labour (in Greek: Παγκύπρια Εργατική Ομοσπονδία)

PES	Public Employment Services
POAS (in Greek: Π.Ο.Α.Σ.)	Pancyprian Organization of Independent Trade Unions (in Greek: Παγκύπρια Ομοσπονδία Ανεξάρτητων Συντεχνιών)
POVEK (in Greek: ΓΣ. ΠΟΒΕΚ)	Cyprus Confederation of Professional Craftsmen and Shopkeepers (in Greek: Γενική Ομοσπονδία Παγκύπριων Οργανώσεων Βιοτέχνων Επαγγελματιών Καταστηματαρχών)
PPM	IMF's Post-Programme Monitoring
PPS	EC/ECB's Post-Programme Surveillance
RSC	European Social Charter (Revised)
SBAs	British Sovereign Areas
SCC	Supreme Court of Cyprus
SDGs	UN Sustainable Development Goals
SEK (in Greek: ΣΕΚ)	Workers' Confederation of Cyprus (in Greek: Συνομοσπονδία Εργατών Κύπρου)
SEPAIK (in Greek: ΣΕΠΑΗΚ)	Professional Union of Employees at EAC (in Greek: Συντεχνία Επιστημονικού Προσωπικού ΑΗΚ)
SEPS (in Greek: ΣΕΨ)	Council of Registered Professional Psychologists (in Greek: Συμβούλιο Εγγραφής Ψυχολόγων Κύπρου)
SIDIDEK (in Greek: ΣΗΔΗΔΕΚ)	(in Greek: Συντεχνία Ημικρατικών, Δημοτικών και Κοινοτικών Εργατοϋπαλλήλων)
SPPM	Social Protection Performance Monitor
SOEs	State-Owned Enterprises
STEM	Science, Technology, Engineering and Mathematics Academic Disciplines
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TMU	Technical Memorandum of Understanding
TVET	Technical, Vocational Education and training
UDHR	Universal Declaration of Human Rights
UEAPME	Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNICE	Union of Industrial and Employers Confederations of Europe
VNRs	Voluntary National Reviews

Chapter 1: Introduction

As Cyprus gradually exits its long-term financial crisis, statistics indicate that forty-seven thousand economically active people in Cyprus are still facing unemployment.[1] The rate of unemployment continues to fall (dropping from 11.1% in 2014 to 7.4% of the total population in 2017), which shows that employment in Cyprus has been improved but has not yet recovered.[2] While Cyprus enters the post-crisis recovery phase, an imperative question arises: how the transformation of Cypriot legal system can provide a sustainable recovery, ensuring that workers can swiftly make transitions in the labour market (that is, enter, remain or re-enter the labour market) without being exposed to the risk of unemployment and a 'race to the bottom' in terms and conditions of employment.

Voltaire wrote that 'work keeps at bay three great evils: boredom, vice, and need'.[3] Work as gainful employment is valuable because it enables workers and their families to obtain the wherewithal to preserve life and human dignity. It is inevitable that unforeseen life circumstances and vagaries of the market, also known as social risks, may occur and interrupt paid work. During these periods of income-loss, social security protection aims to alleviate poverty by compensating workers for temporary or permanent shortfalls in income and redistributing social risks. In an increasingly flexible labour market, employment security remains the Achilles' heel of the Cypriot labour market because individuals still struggle to remain in employment throughout their life cycle. Employment security is not limited to job security. Employment security entails the ability of workers to make swift transitions in the labour market, whereas job security is perceived as the ability of workers to retain a particular job.[4] The concept of employment security sometimes collides with the rigidities of dismissal laws (such as long notice periods), which even if they provide a degree of security, can tie workers into a job that does not satisfy their needs (for example, a position with low salary or long-working hours). Employment security also differs from the bare notion of employability, because facilitating transition of individuals from unemployment to employment through

[1] Eurostat official website <https://ec.europa.eu/eurostat/web/products-datasets/-/med_ps421> accessed 10 August 2019.
[2] Ibid.
[3] William F. Fleming (tr), *Candide* (Voltaire 1759)
<https://ebooks.adelaide.edu.au/v/voltaire/candide/complete.html> accessed 10 August 2019.
[4] European Commission, 'Towards Common Principles of Flexicurity: More and better jobs through flexibility and security - Impact Assessment' SEC (2007) 861 (EC 2007 Communication on Flexicurity), p.20.

Active Labour Market Policies (ALPMs) does not necessarily mean that workers can swiftly transition in the labour market without being exposed to the risk of unemployment.

The Cypriot legal system shows its strong prevalent nature to self-regulate its own operations and the capacity to learn from other economic and structural environments. The autopoiesis of systems, which means self-(re)production, has communications as its core elements.[5] According to the Luhmann's autopoietic theory of social systems, the legal system self-reproduces itself and like any other living system (for example, a plant) if a social system ceases to reproduce its own operations, it ceases to exist.[6] The legal system, as any other social system, has two main features: 'normative closure' and 'cognitive openness'.[7] These two features can justify why the Cypriot legal system is capable of learning from other systems, however, the system can function and mediate collisions only through self-reproduction.

This research project, which contains material available up to and including 31 July 2019, is a multi-level study. It reviews the regulatory systems that are recognized in the Cypriot constitutional order and creates transnational standards for labour and social security protection at the national context, which are the following: the United Nations (UN), which includes the International Labour Organization (ILO) that acts as the pioneer standard-setting actor for promotion of decent jobs and full employment, the Council of Europe (CoE) and the European Union (EU). This research study examines how legal systems as autopoietic systems observe their own operations through their own communications. In this context, it reviews the constraints that are imposed by systems on States and the individuals that participate in them. This thesis also makes a detailed exploration of systems jurisprudence to understand what the Cypriot legal system has learned from other structural environments.

I have used the Cypriot domestic legal system as a case-study for two reasons. Firstly, I have a strong personal bond with Cyprus because I originally come from Cyprus and I studied the Cypriot monist legal system during my undergraduate studies. Secondly, I have a research interest in learning how reflexive solutions could possibly ease the tensions and strengthen the connections between employment security and social security in the post-crisis era.

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[5] Seidi D., 'Luhmann's theory of autopoietic systems' (2004) <https://www.zfog.bwl.uni-muenchen.de/files/mitarbeiter/paper2004_2.pdf> accessed 6 December 2018, p.2.
[6] Ibid, p.4.
[7] Luhmann N., 'Operational closure and structural coupling: the differentiation of the legal system' 13 *Cardoso Law Review* (1992) 1420, p.1420.

This research project will examine the relationship of regulation between employment security and social security systems in the light of flexicurity, an EU-oriented policy strategy that is manifest in the European Employment Strategy (EES), which was characterized by Ralf Rogowski as 'a strategy for reflexive deregulation'.[8] This is the case where deregulation of a system could further lead to re-regulation, as a form of 'regulation for self-regulation'.[9] Through flexicurity policies, as soft-law means of regulation, the interested actors (such as trade unions and employers' representatives) can be involved in the decision-making processes, reflect on the policies and address power imbalances. The theoretical underpinnings of flexicurity stem from the 'paradigmatic' flexicurity practices in the Netherlands and Denmark. In the Netherlands, flexicurity appeared in the early 2000s as a form of facilitating transitions from temporary to permanent employment;[10] whereas, the famous Danish 'Golden Triangle' encompassed three flexicurity elements to fight unemployment: generous unemployment benefits, no strict job security and ALMPs.[11] In the 2007 'Towards common principles of flexicurity' policy document, the European Commission (EC) introduced the four flexicurity components: social security, ALMPs, Life-Long Learning Strategies (LLL) and flexible contractual arrangements. These are considered necessary to achieve the shift from job security to employment security.[12] The flexicurity components are complex, which show that reaching a fair equilibrium between flexibility-security is not an easy task. Unfortunately, the discussion of flexicurity in the EES context, which uses the Open Method of Coordination (OMC), turned into a debate over employability that entails the commercial aspect of flexicurity, rather than on employment security.[13] The OMC could be used as a powerful persuasive tool because it can create a forum for constructive dialogue between social actors, but this potential is not always realised.

The normative rationality of the systems embraces common values, which include equality, human dignity and fundamental rights, to address wider social goals, such as poverty alleviation and elimination of social exclusion. For example, the European Convention on Human Rights (ECHR) and the EU Treaty on European Union (TEU) clearly state that equality

[8] Rogowski R., *Reflexive labour law in the world of society* (Edward Elgar Publishing Limited 2013), p.170.
[9] Ibid.
[10] Wilthagen T. and Tros F., 'The concept of 'flexicurity': a new approach to regulating employment and labour markets' (2004) 10(2) *European Review of Labour and Research* 166, p.173.
[11] Madsen K. P., 'Flexicurity: a new perspective on labour markets and welfare states in Europe' (2008) 14 *Tilburg L. Rev.* 57, p.67.
[12] EC 2007 Communication on Flexicurity (n.4).
[13] European Council Presidency Conclusions (Lisbon, 23 and 24 March 2000), paras.37-40.

and fundamental rights are core values of the regulatory systems.[14] The theory of 'transnational juridification' of labour law system, which was developed by Silvana Sciarra, explains that the labour law system has the tendency to communicate with other systems and protect human rights.[15] The Constitution of Cyprus, the ECHR and the European Union's Charter for Fundamental Rights (EUCFR) enshrine the right to protect workers against unfair or unjustified dismissals and the right to social security.[16] In addition, the right to social security (in Greek: κοινωνική ασφάλεια), which includes social assistance and social insurance, is fundamental to the Constitution of Cyprus.[17] The right to social security also exists in other international and regional human rights law instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR),[18] the European Social Charter (ESC)[19] and the European Social Charter (Revised) (RSC).[20] However, each system has its own important procedural dimensions, which emphasize the divergence between the systems.

The shift from job security to employment security remains a complex and controversial issue that is not fully accepted in Cyprus. The Cypriot Law 24/67, which adopted the minimum standards of ILO Convention N.158, promotes job security. Nevertheless, the educational benefits in Cyprus are limited and appear as student grants (Law 203(I)/2015), which shows that the unemployed people might face a serious risk of poverty, unemployment and social exclusion. Another dissonance is the exclusion of self-employed workers from unemployment schemes, which could leave them trapped in unemployment and lead to the vicious cycle of precarious work. In addition, the rate of youth unemployment in Cyprus reached the rate of 19.1% in 2018,[21] which shows that the EU Directive 2000/78,[22] which prohibits discrimination on the grounds of age in employment and occupation needs to be revisited.

[14] Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C115/13, article 2; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950) ETS 5, Preamble.
[15] Sciarra S., 'Collective Exit Strategies: New Ideas in Transnational Labour Law' in Davidov G. and Langille B. (eds) *The Idea of Labour Law* (1st edn, Oxford University Press 2011), p.407.
[16] Constitution 1960 of Cyprus, English source <http://www.wipo.int/wipolex/en/text.jsp?file_id=189903> accessed 5 December 2018; Charter of Fundamental Rights of the European Union [2012] OJ C326/391.
[17] Ibid (Constitution of Cyprus).
[18] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
[19] European Social Charter (ESC) (18 October 1961) ETS 35.
[20] European Social Charter (Revised) (RSC) (3 May 1996) ETS 163.
[21] Trading Economics official website <https://tradingeconomics.com/cyprus/youth-unemployment-rate> accessed 14 January 2019.
[22] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Equal Treatment Directive) [2000] OJ L303/16.

This thesis is composed of five main chapters. Chapter 2 of the thesis explores the concept of flexicurity, which is an EU-oriented concept, considering its 'ingredients' and their complexities. It discusses the terminological interpretation of 'employment security' and 'job security', which sometimes can converge or collide. In addition, the chapter explores who bears the responsibility to fund the employability programmes for workers and examines the meaning of social dialogue in different multi-level contexts, suggesting that social dialogue could resolve problems that may arise in the regulation of employment security. Also, the chapter scrutinises the theoretical underpinnings of reflexive theory, as developed by Gunther Teubner and Ralf Rogowski, and its potential relevance to communication between employment security and social security systems.

Chapter 3 is focused on international labour standards as they emerged in the ILO, and the distinct UN human rights treaty bodies. This chapter endorses a human rights-based analysis, in which the principle of non-discrimination is placed at its core. The analysis begins with an introduction on the *raison d'être* of the ILO (1919), which then as a UN specialized agency shifted towards a proactive approach to promote full employment and achieve social justice and tackle inequalities. The analysis entails: a) ILO Convention N.158 on Termination of Employment (1982),[23] which sets labour standards for individual and collective dismissals and b) the international labour instruments for non-discrimination. It further examines the minimum standards for social security protection as established in ILO Convention N.102 and the other specialized instruments.[24] The last section looks at the Sustainable Development Goals (SDGs), which is used as soft-law mode of governance and has relevance for future ILO activities.

Chapter 4 primarily focuses on the two landmark instruments of the CoE: the ECHR of 1950 and the European Social Charter, which was revised in 1996 (ESC/RSC). First, it explores how employment security and social security standards are pertained in the evolving jurisprudence of the European Court of Human Rights (ECtHR), which primarily protects civil and political rights. Second, it looks at the work-related and social security rights as endorsed in the ESC/RSC, which is a unique European legal instrument that sets out a comprehensive list of social rights. In this context, the chapter examines complaints that are intrinsically linked

[23] ILO Convention N.158: Convention concerning Termination of Employment at the Initiative of the Employer (68th ILC session Geneva 68th 22 June 1982).
[24] ILO Convention N.102: Convention concerning Minimum Standards of Social Security (35th ILC session Geneva 28 June 1952).

to employment security, job security and social security, which are examined by the Charter's monitoring mechanism, the European Committee on Social Rights (ECSR).

Chapter 5 provides analysis of EU labour law and policy. The regulation of employment security as developed in the *acquis* consists of: first, the regulation of individual dismissals, which is closely linked to EU non-discrimination law; and second, the regulation of economic dismissals, as a special type of regulation that could ease transitions in the European labour market. This chapter also examines EU Regulations on coordination of social security systems, which set the procedures that facilitate the free movement of workers and their families within the EU. The last section is focused on the European Employment Strategy (EES) and Social OMC, which as reflexive policy mechanisms could increase the labour and social security standards through transnational labour regulation.

Chapter 6 is focused on the case study of Cyprus (or Republic of Cyprus). The aim of this chapter is to explore how the Cypriot system has understood the concept of employment security and its relationship with social security system. The second section explains the contextual framework of the Cypriot legal system. In this section, the analysis touches upon the sources of law, the key concepts of 'employee' and 'salaried worker' and further provides an outlook of the Cypriot Economic Adjustment Programme (EAP) and the Post-Programme Surveillance (PPS). The third section explores the forms of social dialogue and discusses the Industrial Relations Code (IRC) that regulates social dialogue at domestic level. The fourth section provides insights of employment security regulation and examines the domestic courts' approach over domestic laws, with focus on Termination of Employment Law 24/67. The last section discusses social security regulation, which includes an analysis of the Cypriot Laws on social insurance and social assistance.

Chapter 2: Flexicurity

2.1 Introduction

Flexicurity, a nexus of flexibility and security, has been characterized by Ralf Rogowski as 'a reflexive deregulatory strategy for regulation'.[1] This is a reflexive strategy that seeks to achieve swift transitions in the labour market and secure employment for all, even for the vulnerable categories of workers, such as older workers and working mothers. Reflexivity aims to persuade actors for the positive effects of 'transitional employment'. Flexibility of labour markets sometimes entails removal of so-called 'rigidities', which could lead to a race to the bottom in labour standards.

Chapter 2 is composed of three main sections. The first consists of an introduction, while the second section explores the theoretical underpinnings of flexicurity and historical origins of flexicurity that are prominent in the Netherlands and Denmark. Despite the strong presence of flexicurity in the European Employment Strategy (EES), the ILO, which is known as the pioneer international standard-setting actor for labour protection, has barely reflected on flexicurity policies. The third section discusses the 'ingredients' of flexicurity and their complexities. This entails an analysis of the terminological confusion between job security and employment security, the funding responsibilities for ALMPs and exploration of the types of social dialogue in the ILO and EU context. The fourth and last section is focused on the theory of reflexive law and its core elements, which were developed by Gunther Teubner and Ralf Rogowski. It makes the link between flexicurity and reflexivity, which could bridge and ease the tensions between the self-referential systems of employment security and social security, through re-regulation.

2.2 History of flexicurity

This section explores the historical development of the concept of flexicurity, which emerged as a method of national policy and transnational regulation. The discussion begins with the Dutch and Danish flexicurity models. It focuses on a Dutch law (i.e. the Flexibility and Security Act) and the Danish Golden Triangle, which successfully combined generous

[1] Rogowski R., *Reflexive labour law in the world of society* (Edward Elgar Publishing Limited 2013), p.130.

unemployment benefits, ALMPs and flexible working arrangements. The first sub-section provides an historical analysis of flexicurity as conceptualized within the EU regime. Even if the idea of flexicurity is known as an EU-oriented concept, the second sub-section attempts to explore the emergence and development of flexicurity in the international domain.

2.2.1 The origins of flexicurity: the Netherlands and Denmark

The Dutch Model

The first country that introduced flexicurity policies was the Netherlands. The term 'flexicurity', a catchy word that someone could easily remember that connects flexibility and security, was first coined by Hans Adriaansens, who was a Dutch sociologist and a member of the Dutch Scientific Council for Government Policy (WRR).[2] During preparatory discussions for the new 'Flexibility and Social Security Law' and 'the Act concerning the Allocation of Workers via Intermediaries', Andriaansens used the term 'flexicurity' to express the need to adopt a new approach, making a shift from 'job security' to 'employment security'.[3]

The Dutch flexicurity model initially appeared in the early 20th century, which facilitated the transition from temporary to permanent employment. At that time, the Dutch dismissal law entailed strict procedural requirements, which were characterized by the business world as 'burdens to business'.[4] To explain, an employment contract could only be terminated if the employer had followed one of the two procedures: a) either after notifying the Centre for Work and Income, which was the regional public employment service; b) or after bringing a claim before domestic courts in case of a 'serious cause'.[5] For this reason, the Dutch dismissal system was usually characterized as 'a dual system'.[6] The Dutch Minister of Social Affairs and Employment, Mr. Ad Melkert, understood the dissatisfaction of the business world, which was caused by the two procedures, and took the initiative to strengthen labour market flexibility and social security, by drafting the Memorandum on 'Flexibility and Security' ('Flexibiliteit en Zekerheid', December 1995).[7] According to Keune and Jepsen, the two Acts were 'a product of the Dutch Polder Model', also known as the 'purple coalition government of the

[2] Keune M. and Jepsen M., 'Not balanced and hardly new: the European Commission's quest for flexicurity' (2007) WP 2007.01 <https://www.etui.org/Publications2/Working-Papers/Not-balanced-and-hardly-new-the-European-Commission-s-quest-for-flexicurity> accessed 12 August 2019, p.5.
[3] Wilthagen T. and Tros F., 'The concept of 'flexicurity': a new approach to regulating employment and labour markets' (2004) 10(2) *European Review of Labour and Research* 166, p.173.
[4] Ibid.
[5] Ibid.
[6] Ibid, p.172.
[7] Ibid, p.173.

1990s' (i.e. Labour, Liberals and Social Liberals).[8] This coalition placed as a high priority the objectives to improve labour protection, increase competitiveness and strike a balance of employers' and workers' interests.[9] The Memorandum of 1995 did not lead to the conclusion of an agreement.

In November 1997, the lower house of Parliament finally adopted 'the Flexibility and Security Act'.[10] The legislation proposal, which was submitted by the Dutch Government to the Parliament in 1997, was based on the two following proposals: the Memorandum of Labour Foundation and the 'Start Agreement'.[11] Both proposals raised the issue that plagued Dutch labour system in the 1980s-90s, according to which temporary agency workers faced an increased risk of employment insecurity.[12] The Memorandum of Labour Foundation was drafted on 3 April 1996 after the request for advice from the Dutch Government by the Labour Foundation (Stichting van de Arbeid).[13] The Labour Foundation, which acted as the consultation body in the Dutch Polder Model, was only comprised by the major workers' and employers' representative organizations.[14]

'The Start Agreement' was concluded in April 1993 by ' Start', a Dutch employment agency, taking the form of a five-year collective agreement on regulation of temporary agency workers.[15] This agreement established a 'four-phase system', according to which temporary agency workers would be gradually granted more rights, such as access to pension schemes.[16] After completing eighteen months in a particular job position or thirty-six months in multiple positions, these temporary agency workers were able to transition from temporary to permanent employment.[17] The Start Agreement introduced a system in which the degree of flexibility and security was related to the completed employment period of the temporary agency worker. There was also an attempt to provide 'job' as opposed to only 'employment' security, if temporary agency workers stayed in position for the requisite length of time.

[8] Keune and Jepsen (n.2).
[9] Ibid.
[10] Wilthagen and Tros (n.3), p.174.
[11] Ibid.
[12] Ibid.
[13] Ibid, p.173.
[14] Ibid, p.174.
[15] Ibid.
[16] Ibid.
[17] Ibid.

The Danish Model

The Danish flexicurity model is known as the 'Golden Triangle'. This model, which tackled unemployment and social exclusion, was particularly successful because it faced difficult times such as the economic distress in the 1970s and 1980s and survived.[18] The term 'Triangle' is used because the model combines three core elements: a) external numerical flexibility, which removes the restrictions from dismissal laws to ease the tensions of job security-employment security; b) generous unemployment benefits to guarantee an income through the transition; and c) ALMPs to increase employability and push workers back to employment.[19] The removal of restrictions in dismissal laws could also be implied as a removal of employment protections, which could mean a decrease in the degree of job security.[20]

The Danish model of flexicurity was characterized as a 'model of a special nature' because it combines low levels of employment protection with high levels of external numerical flexibility and income security with ALMPs.[21] Madsen sees the Danish model as idealistic because it does not fully represent the Danish reality.[22] He claims that generous unemployment benefits could facilitate the shift from employment to inactivity, since the income security that is provided as unemployment benefit could possibly make the individuals unwilling to find a job and return to employment.[23]

2.2.2 Flexicurity and the European Union

The concept of flexicurity as known today emerged for the first time in the 2007 EC Communication titled as 'Towards Common principles of flexicurity: more and better jobs through flexibility and security'.[24] This EC policy document defined the term of 'flexicurity' as 'an integrated strategy to enhance, at the same time, flexibility and security in the labour market', two concepts which appeared separately in the early 1990s as 'pillars of national systems'.[25] The 2007 EC policy document also set out the four flexicurity ingredients (also known as 'components') to achieve an equilibrium between flexibility-security: flexible and

[18] Madsen K. P., 'Flexicurity: a new perspective on labour markets and welfare states in Europe' (2008) 14 *Tilburg L. Rev.* 57, p.67.
[19] Ibid, p.64.
[20] Ibid.
[21] Ibid, p.67.
[22] Ibid.
[23] Ibid.
[24] European Commission, 'Towards Common Principles of Flexicurity: More and better jobs through flexibility and security - Impact Assessment' SEC (2007) 861 (EC 2007 Communication on Flexicurity).
[25] European Commission, White Paper, Growth, Competitiveness, and Employment: The challenges and ways forward into the 21st century, COM (93) 700 final (EC 1993 White Paper), p.13.

reliable contractual arrangements, Comprehensive life-long learning (LLL), effective active labour market policies (ALMPs) and modern social security systems.[26] A similar approach was adopted in regard to security, where the EC extended the scope of security, which apart from employment protection, also covers unemployment benefits and vocational and training programmes.[27]

The 2007 Communication of the EU laid out eight general principles of flexicurity that shall be respected by the Member States.[28] These principles expressed the role of flexicurity as an EU policy tool in achieving the core mandate of the EU to become the most competitive economy in the world. The EU Communication particularly referred to the need to 'strengthen the European social models' and 'implement the Growth and Jobs Strategy'.[29] It explained that the idea of flexicurity involves complex balances, observing that, apart from the most profound one between flexibility and security, the Member States shall strike the right balance between rights and responsibilities of different actors.[30] The flexicurity principles seemed idealistic because they promote the protection and respect of general principles and human rights, such as gender equality, universality, labour rights and welfare. Flexicurity principle 8 laid out that the flexicurity policies shall be adopted to the extent that they do not create excessive 'budgetary costs', which shows that pragmatic economic barriers could create 'reasonable' obstacles for the realization of flexicure labour markets.[31] This principle shows that realization of national flexicurity policies reflect the discretionary budgetary preferences of each Member State, which does not necessarily represent their economic situation in terms of necessity. Through the prism of the Europe 2020: Growth and Jobs and the initiative of an Agenda for new skills and jobs, which was introduced to increase labour opportunities, flexicurity policies have been established as key target.[32]

Even before the adoption of the 2007 policy document, the four flexicurity 'ingredients' started to appear separately in the EU context. In the White Paper on Growth, Competitiveness and Employment (1993), the European Commission (EC) flagged up that the absence of internal-external flexible working arrangements, educational and training programmes and social

[26] EC 2007 Communication on Flexicurity (n.24), p.5.
[27] Ibid.
[28] Ibid.
[29] Ibid, p.9.
[30] Ibid.
[31] Ibid.
[32] European Commission, An Agenda for new skills and jobs: A European contribution towards full employment, November 2010, COM (2010) 682 final.

security protection, which were later recognized in the 2007 EC flexicurity policy document as 'flexicurity components', were the root causes of unemployment. The White Paper of 1993 recognized the increase of competitiveness as an aim of flexible working arrangements, a form of 'decentralized movement'.[33] The distinction between internal and external flexibility, which also appears in the 'Wilthagen matrix', aims to distinguish the aims of each type of flexibility. To explain, external flexibility aims to ease the transition from unemployment to active employment, whereas internal flexible working arrangements attempt to reduce the risk of redundancy by allowing opportunities for jobs to be performed in potentially unprecedented ways, such as, for example, in terms of hours and location.[34] In the 2007 EC Document, flexibility is described as 'successful transitions' through lifetime – e.g. from school to employment, from unemployment to employment, from one job to another, from employment to retirement.[35] The EC adopted a broader concept of flexibility from that applied in the Dutch and Danish models of flexicurity, which solely refer to the transition from unemployment to employment and from one job to another.[36]

The Green Paper on Partnership for a New Organization for Work (1997), which was adopted by the EC, also introduced flexibility-security in the policy discussions.[37] In the 1997 Green Paper, flexibility and security, which again were recognized as two distinct dynamics and powers, entailed the introduction of employability policies, as means to facilitate and support access to employment for people, who were inactive for multiple reasons, such as lack of employability skills.[38]

The 2000 Lisbon Strategy, which introduced the EU development plan for the 2000-2020 period, did not refer to flexicurity. In an increasingly competitive economy, the discussion shifted from employment security to employability. The EES used the Open Method of Coordination (OMC), which was introduced in 1997 as a policy tool to facilitate exchange of information and attain the Lisbon targets, for example fostering employability.[39] As Funk

[33] EC 1993 White Paper (n.25), p.11.
[34] Ibid, p.17.
[35] EC 2007 Communication on Flexicurity (n.24), p.4.
[36] Ibid, p.5.
[37] European Commission, Green Paper on Partnership for a new organization for work COM (1997) 128 final, p.12.
[38] Ibid, pp.13-14.
[39] European Council Presidency Conclusions (Lisbon, 23 and 24 March 2000) (Lisbon Strategy 2000), paras.37-40.

stressed, the OMC occupies a dominant place at EU-level because it decreases the risk of a political conflict and enables the Member States to adopt their own domestic social model.[40]

The EU primary goal was to establish the EU as the most competitive and 'dynamic knowledge-based economy' in the international arena, which will have the highest levels of economic efficiency.[41] The 2000 Lisbon Strategy set out a list of different sub-targets, which included two of the core components of flexicurity (i.e. ALMPs and social security).[42] Employment security, which cannot be found in the text of Lisbon Strategy of 2000 and constitutes a key component of flexicurity, might be brought under the umbrella of social inclusion. To explain, paragraph 32 in the Lisbon Strategy of 2000 characterized employment as 'the best safeguard against social exclusion'.[43] It seems that this argument is not very strong because the statement which is found in paragraph 32 in the Lisbon Strategy might refer only to the transition from unemployment to employment through ALMPs, which does not necessarily mean to reduce the risk of dismissal and redundancy. The reference to the three key components of flexicurity as separate concepts - i.e. employment security, ALMPs and social security - demonstrates that the Lisbon Strategy of 2000 is *prima facie* a step of minor importance towards the conceptualization of flexicurity.

The Employment Guidelines of 2001, which set out the employment priorities based on the Lisbon Strategy of 2000, recognized the two core parts of a flexicurity equilibrium (i.e. flexibility and security), however, it failed to recognize the four constituent 'ingredients' of flexicurity (i.e. flexible contractual arrangements, social security protection, ALMPs and LLL). In the 2001 European Employment Guideline 13, the fair balance between flexibility and security appeared for the first time.[44] In the section on 'improving employability', the 2001 Guidelines just put social security systems and ALMPs as key objectives, but failed to link them with the nexus of flexibility and security.[45] The EC further added the notion of 'job quality' in the flexibility and security equilibrium in the 2002 Communication from the EC, which reviewed the EES between 1997 and 2001.[46] In this 2002 policy document, the EC

[40] Funk L., 'European Flexicurity Policies: A Critical Assessment' (2008) 24(3) *International Journal of Comparative Labour Law and Industrial Relations* 349, p.361.
[41] Lisbon Strategy 2000 (n.39), Preamble.
[42] Ibid.
[43] Ibid, para.32.
[44] Council Decision 2001/63 of 19 January 2001 on Guidelines for Member States' employment policies for the year 2001 [2001] OJ L22/18, guideline 13.
[45] Ibid.
[46] European Commission, 'Taking stock of five years of the European Employment Strategy COM (2002) 416 final.

discussed the current developments for striking a flexibility and security balance.[47] Flexibility, which took the form of 'flexible types of employment relationships' and 'flexible working time arrangements', was integrated in the pillar of adaptability.[48] The 2005 Integrated Guideline 20 set the flexible arrangements, irrespective of the type of employment, as a goal for productivity growth and employment security.[49] In the 2005 Guideline 16, social security, which is a flexicurity ingredient, was set as a necessary ingredient for social inclusion that is entailed in the concept of employment security.[50]

In 2010, the EU launched the Europe Strategy 2020: Growth and Jobs, replacing the targets of Lisbon Strategy for Growth and Jobs with new targets that will make the EU a 'smart, sustainable and inclusive economy'.[51] In the realm of article 145 of the Treaty on the Functioning of the European Union (TFEU), which sets out the importance of collaboration between the Union and the Member States in the field of employment, the Council adopted the 2010 Decision on the guidelines for the employment policies of the Member States.[52] Guideline 7 that is annexed to the 2010 Council Decision, prompts the Member States to adopt flexicurity policies at domestic level, denoting that flexibility and security 'shall be both balanced and mutually reinforcing'.[53] The idea of flexicurity is conceptualized in the 'European Guideline 7: Enhancing the functioning of labour markets' of 2015, which was proposed as part of a new package of integrated policy guidelines by the EC and adopted by the Council in 2016. The European Guideline 7 explicitly refers to 'flexicurity principles' (nexus of flexibility and security).[54] It further explains that employment protection should be provided to individuals inside and outside the labour market in adequate levels.[55] The other two key components of flexicurity – i.e. social security, which is brought under the umbrella

[47] Ibid, p.13.
[48] Ibid.
[49] European Commission, The new Integrated economic and employment guidelines (Brussels, 12 April 2005) <https://2007-2013.espa.gr/elibrary/integrated_guidelines_Growth_Jobs_en.pdf> accessed 12 August 2019 Guideline 20; Council Decision 2005/600 on Guidelines for the Employment Policies of the Member States [2005] OJ L205/21.
[50] Ibid, Integrated Guideline 16.
[51] European Commission, Communication from the Commission: Europe 2020: A strategy for smart, sustainable and inclusive growth Europe 2020 COM (2010) 2020 final.
[52] Council Decision 2010/707 of 21 October 2010 on guidelines for the employment policies of the Member States [2010] OJ L308/46.
[53] Ibid, 'Guideline 7'.
[54] Ibid.
[55] Ibid.

of 'socioeconomic security', and 'education and training opportunities' – are strictly linked to 'quality employment'.[56]

Under the umbrella of Europe Strategy 2020, the EC introduced the Country-Specific Recommendations (CSR) through which it gives suggestions to the Member States in many fields, which include employment and social policies.[57] These CSR, which constitute part of the National Reform and Stability Programme, are published every year.[58] EU Member States, which are under an Economic Adjustment Programme (EAP), are excluded from the CSR during the period that participates in the Programme.[59] For this reason, the Republic of Cyprus was excluded from the CSR from 2011 and included again in this programme in 2016, when it successfully exited the EAP.[60]

2.2.3 International recognition of flexicurity

According to the principle of hermeneutics, each regulatory system, acting as the receptor and listener of the information, decides on the substance of the information.[61] In this context, the flexicurity concept discretely appeared in ILO policy-making forums.[62] The 2009 Report on Combining Flexibility and Security for Decent Work, integrates flexicurity in the ILO agenda. In the 306th International Labour Conference (ILC) Session, 'flexicurity' was discussed in the ILO based on the domains that were set in the EU regime.[63]

Flexicurity appeared as an 'element of balanced national growth strategies' in the 2007 ILO discussion paper on 'Growth, Employment and Social Protection: A strategy for balanced growth in a global market economy', which was prepared for the Informal Ministerial Meeting of Ministers of Labour and Social Affairs during the ILC.[64] Social security protection, which

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[56] Ibid.
[57] EU official website, EU Country-Specific Recommendations <https://ec.europa.eu/info/strategy/european-semester/european-semester-timeline/eu-country-specific-recommendations_en> accessed 6 December 2018.
[58] Ibid.
[59] Regulation No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1, article 12.
[60] Ibid, article 14.
[61] Seidi D, 'Luhmann's theory of autopoietic systems' (2004) <https://www.zfog.bwl.uni-muenchen.de/files/mitarbeiter/paper2004_2.pdf> accessed 6 December 2018, p.2.
[62] International Labour Office, Governing Body, Committee on Employment and Social Policy, Third item on the agenda: Combining flexibility and security for decent work (306th session November 2009) GB.306/ESP/3/1, p.2 para.5.
[63] Ibid, pp.2-3.
[64] International Labour Office, 'Growth, employment and social protection: A strategy for balanced growth in a global market economy: A discussion paper for the Informal Ministerial Meeting of Ministers of Labour and Social Affairs during the International Labour Conference' (Geneva 12 June 2007), p.3.

was not traditionally developed as an economic measure, was turned into a tool for achieving competitiveness and improving economic performance.[65] During the 301st Session of the Governing Body of the International Labour Office in 2008, the idea of flexicurity was discussed and conceived as 'a tool facilitating adaptation to changes in the globalized economy'.[66] The Employer Vice-Person saw flexicurity through a slightly different perspective, by deploying the idea that flexicurity does not only constitute a useful 'tool' but a 'strategy' which deals with major societal problems, such as employment promotion and work organization.[67]

In the Joint Conclusions of the 7th High-Level Meeting between the EC and the International Labour Office (December 2008), the actors expressed their intention and their desire to cooperate and assist each other to put forward the flexicurity policies.[68] The EC noted *inter alia* that the ILO shall decide the appropriate indicators to examine flexibility and security.[69] The term 'indicators' was not defined by the EC, which did not even set out few examples of these indicators, showing its reluctance to exchange substantial information on the issue with the ILO. During the 8th European Regional Meeting (ERM) of the ILO in 2009, flexicurity took the form of 'a useful policy mix to balance flexibility and security'.[70] Whereas, during the 7th ERM in Europe and Central Asia in 2005, the ILO's constituents agreed on the fact the flexicurity, a nexus of flexibility and security, shall be useful for both employers and workers.[71] In the 7th ERM, the participants had also touched upon the importance of social dialogue in striking the right balance between flexibility and security.[72]

In the 104th ILC Session, the ILO Future of Work initiative was launched to celebrate the 100th anniversary in 2019 and reflect on the continuing challenges in the world of work.[73] The realization of social justice, which is the constitutional mandate of the ILO, still has not been

[65] Ibid, p.3.
[66] International Labour Office, Governing Body, Minutes of the 301st Session of the Governing Body of the International Labour Office (301st session Geneva March 2008) GB.301/PV, p.3.
[67] Ibid, p.4.
[68] Joint conclusions of the 7th High-Level Meeting between the European Commission and the International Labour Office (Geneva 2 December 2008), pp.4-5.
[69] Ibid, p.5.
[70] International Labour Organization, Eighth European Regional Meeting, 'Working out of crisis: Strategies for Decent Work in Europe and Central Asia', Conclusions of the Eighth European Regional Meeting of the ILO (Lisbon, 9–13 February 2009) ERM/VIII/D.5(Rev.).
[71] International Labour Organization, Seventh European Regional Meeting, Conclusions (Budapest 14-18 February 2005) ERM/VII/D.6.
[72] Ibid.
[73] International Labour Conference 'Report of the Director-General Report I: The future of work centenary initiative' (104th ILC session Geneva 2015), pp.5-7.

achieved as insecurity in employment remains.[74] The Director's General Report also referred to the failure of flexicurity, as non-standard forms of employment are linked to a race of bottom in labour standards.[75] In this ILC session, the Worker Members articulated the view that there is no theoretical conceptualization of flexicurity and no clear definition of flexicurity at international and EU-level.[76] This view is particularly interesting because it shows the level of ambiguity (and ambivalence) that exists among ILO members regarding conceptualizing the idea of flexicurity.[77] Also, the workers' representatives may disagree because setting out a clear definition of flexicurity could be a boost for greater flexibility (as opposed to a shield for security). The fact that the concept of flexicurity has not been enshrined in any EU binding instrument, led the Worker Members to prioritize ILO instruments over flexicurity, arguing that the idea of flexicurity cannot be used by the ILO members as an excuse for non-compliance to ILO Conventions and Recommendations.[78] The flexibility ingredient is distinct from the two types of security (employment security-social security), which are recognized as indicators in the Decent Work Agenda (DWA).[79]

The 2017 Inception Report for the Global Commission on the Future of Work discusses the implications of flexible working arrangements on job security and employment security, as the flexibilization of labour market seems to facilitate the transition from non-standard forms of employment to unemployment.[80] Nevertheless, labour market flexibility has two main advantages: a) it has positive effects on jobs creation and b) it helps workers to strike a balance between work and family responsibilities. However, the increasing flexibility of labour markets remains a continuing struggle for workers, as it could lead to flexibilization of dismissals procedures, leading to a race of bottom of labour standards.[81] In the 21st century, 'job (in)security matters' because non-standard forms of employment, as flexible working arrangements, could also lead to psychosocial risks, which could affect the ability of workers

[74] Ibid.
[75] Ibid.
[76] International Labour Conference, Third item on the agenda: Information and reports on the application of Conventions and Recommendations, Report of the Committee on the Application of Standards (104th Session Geneva June 2015).
[77] Ibid, p.123.
[78] Ibid.
[79] International Labour Office, Decent work indicators: guidelines for producers and users of statistical and legal framework indicators (Geneva: ILO, 2013).
[80] ILO Inception Report for the Global Commission on the Future of Work (2017) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_591502.pdf> accessed 14 January 2019, p.6.
[81] Ibid, p.23.

to remain in the labour market.[82] The 2017 Report also discusses the deficits of social security protection and the current debate for a 'basic income for all', which is enshrined in the ILO Recommendation on Social Protection Floors (N.202).[83]

In the Synthesis Report of national social dialogues, the Representatives from Nigeria stated that through this process, the Member States will be able to learn from other countries how to strike a balance between flexibility and security.[84] Germany's representatives referred to the need to impose limits on external flexibility to ensure security for temporary agency workers.[85] In addition, the 2017 Report stated that collective bargaining should be used to strike a fair balance between flexibility and security in Spain.[86]

2.2.4 Conclusion

Throughout the historical development of flexicurity, the EU adopts a more dynamic and proactive approach towards flexicurity and prompts the EU Member States through indirect means (i.e. OMC and CSR) to strike their own balances between flexibility and security. Despite the efforts of the EU to set out a clear definition of flexicurity, it seems that its definition still appears ambiguous and its application, which will be analysed further in the next section, tends to be problematic. Since there are multiple forms of flexibility and security and there is 'no one size fits for all',[87] the interplay of flexibility and security becomes more complex. In the Danish model of flexicurity, a special combination of low levels of employment protection and high levels of external numerical flexibility, is used as a paradigm. However, the intersection of the 'golden' components could be determined *ad hoc* based on the features of each domestic labour system. In addition, it appears that job security is not treated as priority at all in the 2019 ILO Report 'Global Commission on the future of work', which adopted three pillars for 'a human-centred agenda for the future of work': a) increasing investment in people's capabilities b) increasing investment in the institutions of work and c) increasing investment in decent and sustainable work.[88] This is interesting because the ILO,

[82] Ibid, p.19.
[83] Ibid, p.21.
[84] ILO Synthesis Report of the National Dialogue on the Future of Work (2017) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_591505.pdf> accessed 6 March 2019, p.31.
[85] Ibid, p.42.
[86] Ibid, p.62.
[87] Cazes S. and Nesporova A. (eds) *Flexicurity: a relevant approach in Central and Eastern Europe* (International Labour Office 2007), p.4.
[88] ILO Global Commission on the Future of work (2019) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf> accessed 17 February 2019 (Global Commission Report 2019).

through the adoption of ILO Convention N.158, had already shown its strong desire for transnational governance of job security standards. The 2019 Global Report seems to focus on transitions in employment, which could be characterized as a reflection of EU's flexicurity policies, rather than endorsing job security protections.

2.3 Understanding the complexities of flexicurity components

This section explores the deficient theoretical foundations of flexicurity components. It attempts to identify the problematic issues around the ingredients of flexicurity and hence, develop a thorough understanding of flexicurity. The first sub-section discusses the imminent need to shift from employment to job security in the discourse of flexicurity and assesses the textual and normative complexities of this shift. The second sub-section examines the similarities and differences between Active Labour Market Policies (ALMPs) and Life-Long Learning Strategies (LLL) and attempts to identify who has the responsibility to provide vocational training and education programmes, which would enable the individuals to shift easily from one job to another, or from unemployment to decent employment. For this reason, the ALMPs as suggested below, shall seek to improve the employability skills of individuals to help them to get a decent job. Lastly, the third sub-section focuses on the role of social dialogue in the sphere of flexicurity and particularly examines whether the term 'social dialogue' encompasses the idea of collective bargaining.

2.3.1 Employment security and job security

Employment security and job security, as perceived in the EU flexicurity debate, constitute two different forms of security. The terminology of the two concepts, which sometimes can collide, is not clear. The 2007 EC policy document referred to the shift from job security to employment security.[89] From the EC's perspective, it seems that there is a clear distinction between job and employment security because they differ on the aims and goals that they attain to accomplish. The concept of job security, which has a *sensu stricto* meaning, aims to secure a particular job.[90] On the other hand, the mandate of employment security is to 'preserve people's ability to enter, remain and progress in employment throughout the life-cycle'.[91]

[89] EC 2007 Communication on Flexicurity (n.24), pp.20-21.
[90] Ibid, p.20.
[91] Ibid.

Although the words 'employment' and 'job' are often used as synonyms in colloquial speech, 'employment' in the concept of employment security has a broader meaning which aims to enable individuals to transition easily and successfully from one job to another, or from unemployment to employment. Through these transitions, employment security in the broader context entails that individuals are provided with adequate social protection. This approach was also adopted in the 2007 EC Communication 'Towards Common Principles of Flexicurity'.[92] In this document, the EC emphasized the need to focus on fostering employment security rather than job security because in the rise of globalization, individuals struggle to retain a job for a lifetime.[93]

It seems that embedding the ingredient of 'employability' in the concept of employment security has caused terminological confusion among scholars. According to Nina Zekic, the increasing need to secure an individual's ability to remain in the labour market and depend on their employability is usually described as 'employment security'.[94] Many scholars also refer to 'employability security' or 'labour market security' or even 'job security' in order to describe these swift transitions in the labour market (although the latter seems obviously a misnomer).[95] In the scope of industrial labour and economics, Auer used the term 'job security' to describe security in the current job position (a particular job) and 'employment security' for securing employment with the current employer ('multiple jobs').[96] He has observed that the transition from job security to employment security dates back to 1980s.[97] He emphasized the need for 'a critical and decisive shift' from 'job/employment security' to 'labour market security', which refers to swift transitions for individuals in the labour market.[98]

Job security and employment security are also recognized as core forms of security in the flexicurity 'Wilthagen matrix', which was developed by Ton Wilthagen.[99] This Matrix shows that combining different types of flexibility and security, as two mutually supportive concepts, are inter-related to the transitions in the labour market. There are four forms of security: job security, employment security, income security and combination security. 'Employment

[92] Ibid, pp.20-21.
[93] Ibid, p.20.
[94] Zekic N., 'Job security or employment security: What's in a name?' (2016) 7(4) *European Labour Law Journal* 548, pp.548-549.
[95] Ibid.
[96] Auer P., 'What's in a Name? The Rise (and Fall?) of Flexicurity' (2010) 52(3) *Journal of Industrial Relations* 371, pp.380-381.
[97] Ibid.
[98] Ibid.
[99] Wilthagen T. and Tros F. (n.3), p.171.

security' takes the meaning of remaining in paid work, which does not necessarily mean to remain with the same employer or retain the same job, whereas the term 'job security' is used to describe the security of the current job.[100]

In the discourse of flexicurity, it seems that the concepts of 'job security', 'employment security' and 'labour market security' are interpreted differently among scholars and standard-setting actors. In the ILO regime, job security means to secure a job which is compatible with the individuals' interests and skills, whereas employment security mainly refers to protection against unfair or unjustified dismissal.[101] The idea of 'labour market security' exists in the ILO sphere and it has taken a quite similar meaning to Auer's interpretation of the term, which entails other types of security for swift transitions in the labour market (e.g. employment protection, social security and income security).[102] In this context, labour market security generally refers to ALMPs, which appeared in the ILO Socio-Economic Security Programme as 'opportunities for adequate income-earning activities'.[103] The ILO's perspective on labour market policies focuses on employability without ensuring income security through transitions in the labour market, as did Auer's version of 'labour market security'.

In the EU regime, employment security and job security seem to appear *prima facie* as distinct concepts. The 2007 EC staff working document, illustrates that there is a clear-cut terminological distinction between job and employment security. However, the 2008 Report of the Mission for Flexicurity shows that vagueness remains at EU level.[104] In the 2008 Report the term 'job security' was used to describe swift transitions of individuals in the labour market, while enforcing ALMPs and ensuring income security through these transitions.[105]

As an overall conclusion, it seems that there are two main problems in the distinction between job security and employment security in the flexicurity discourse. Firstly, there is the textual or terminological confusion between job security, employment security and labour market security, which was analysed above. In the discourse of flexicurity, employment security seems to refer to swift transitions in the labour market rather than securing a particular job.

[100] Ibid.
[101] ILO Socio-economic security programme, 'Definitions: What we mean when we say "economic security"' <http://www.ilo.org/public/english/protection/ses/download/docs/definition.pdf> accessed 6 December 2018.
[102] Auer (n.96), pp.381.
[103] ILO Socio-Economic Security Programme (n.101).
[104] Council of the EU, 'Implementation of the common principles of flexicurity within the framework of the 2008-2010 round of the Lisbon Strategy - Report by the "flexicurity" mission (Brussels, 12 September 2008) SOC 776 ECOFIN 606.
[105] Ibid, p.4.

The terminological confusion creates additional obstacles to the realization of flexicurity policies because it makes it more difficult for standard-setting actors to conceptualize the idea of flexicurity. Since this research deals with the concept of employment security within different systems, each section will clarify the terminological use of 'employment security' as it exists at multi-level regulation. It would be irrational to adopt a clear-cut definition of employment security and disregard the way that employment security is interpreted in various contexts, both by standard-setting actors and scholars.

Secondly, it seems that facilitation of dismissals does not mean that individuals can automatically swift easily in the labour market, that is, from one job to another, from unemployment to employment. The empowerment of employment security, which entails effective application of flexicurity policies and mediating arising collisions with job security standards, is more complex from solely fostering job security. Below, there are examples of successful and unsuccessful flexicurity models, which will help the reader understand why employment security is a complex concept. The Danish model of flexicurity is almost an identical paradigm to the idea of EU flexicurity, composed of low levels of job security (being able to remain in a particular job) and high levels of employment security (swift transitions in the labour market).[106]

Whereas, the Spanish Labour Market Reform of 2012, which *inter alia* facilitated dismissal procedures, increased the number of precarious temporary contracts and did not manage to tackle the problem of unemployment.[107] This 'thoroughly unbalanced implementation of flexicurity' was described by Julia López, Alexandre de le Court and Sergio Canalda as 'flexiprecarity'.[108] In addition, the case of Greece illustrates that removal of jobs protections can have serious adverse effects on the effective application of flexicurity policies. In the 2014 CEACR's Observation Comment on the application of ILO Convention on Discrimination (Employment and Occupation) (N.111), the CEACR criticized the implications of Acts N.4024/2011 and N.4093/2012 and urged Greek authorities to 'end the flexibilization of employment relationships in the private and the public sectors'.[109] Greek Act N.4024/2011, which provided that certain categories of workers can be dismissed without prior notice, could be conceived as a form of external numerical flexibility. Whereas, Greek Act N.4093/2012

[106] Madsen (n.18), p.67.
[107] López J., de le Court A. and Canalda S., 'Breaking the Equilibrium Between Flexibility and Security' (2014) 1(5) *European Labour Law Journal* 18, p.40.
[108] Ibid, p.32.
[109] CEACR Observation on Convention N.111, Greece (adopted 2014, published 104th ILC session, 2015).

seems to endorse internal flexibility because it has provided conversion from full-time to part-time public employment contracts and 'rotation work contracts in the private enforcement contracts'.[110] This shows that removal of employment protection (or in the language used above within the EU, job security) barriers could facilitate the transition from employment to unemployment, instead of transition from one job to another. It seems that the divergence of theoretical conceptualization of employment security makes the realization of flexicurity more complicated. The major problem, which needs to be addressed at domestic level, is to strengthen the inter-connection between facilitation of dismissal procedures and transition from one job to another. The facilitation of dismissal procedures could act as an essential pre-requisite for fostering employment security protection and the level of this facilitation could be linked to the level of employment security and social security.

2.3.2 Who pays for the training?

In 2007, the EC established that Active Labour Market Policies (ALMPs) and Comprehensive Lifelong Learning Strategies (LLL) shall constitute two 'core policy components' of flexicurity.[111] Both flexicurity components endorsed the concepts of adaptability and employability, reflecting an EU old practice to promote adaptability-employability as means to reduce the risk of unemployment. The Essen Council set vocational training as a 'priority area', prompting the Member States to adopt policies and enhance employability at domestic level.[112] Similarly, the Integrated Guidelines for Growth and Jobs 2005-2008 urged the Member States to adapt their education and training systems to existing competition challenges.[113] As Wilkinson commented, ALMPs are mainly focused on addressing 'unemployability' rather than 'unemployment'.[114] In the Joint Employment Report of 2001, the EC articulated the view that employability policies, which are adopted under the employability pillar and aim to reduce the skills gap, can cause adverse effects on job security (i.e. 'security in a specific job').[115] Before the EC recognized ALMPs and LLL as core

[110] Ibid; Greek Legislation, N.4024/2011 ΦΕΚ Α΄ 226, <http://www.ydmed.gov.gr/wp-content/uploads/2011127_FekA226_%20%20N4024.pdf> (available only in Greek) accessed 15 November 2018; Greek Legislation, N.4093/201<https://www.kodiko.gr/nomologia/document_navigation/68689/nomos-4093-2012> (available only in Greek) accessed 15 November 2018.
[111] EC 2007 Communication on Flexicurity (n.24), p.5.
[112] Ashiagbor D., *The European Employment Strategy* (Oxford University Press 2005), p.38.
[113] European Commission, The new integrated economic and employment guidelines (Brussels, 12 April 2005) <https://2007-2013.espa.gr/elibrary/integrated_guidelines_Growth_Jobs_en.pdf> accessed 12 August 2019, Guideline 23.
[114] Wilkinson F., 'Inflation and employment: Is there a Third Way (2000) 24 *Cambridge Journal of Economics* 643, pp.644 and 665.
[115] European Commission, Joint Employment Report 2001 COM (2001) 438 final.

components of flexicurity, Diamond Ashiagbor had already conceptualized the interconnection between ALMPs and flexibility, characterising ALMPs as a 'logical complement to flexible labour markets'.[116]

Through the lens of the EC, the mandate of LLL is conceived as the 'continual adaptability and employability of workers', whereas the ALMPs aim to make workers to adapt to 'rapid changes' and facilitate the transition from one job to another.[117] It seems that LLL are aiming at a long-term impact on individuals' abilities and educational level, whereas ALMPs are used as driving force which pulls individuals out from unemployment and build bridges between jobs, preventing individuals to trapped into unemployment. LLL could be conceived as an investment to quality education and technical expertise of the worker, which will make the workers able to adapt and cope with the challenges in the stiff and long run of competitive firms.

ALMPs are mainly distinguished in four broad categories in the literature: job search assistance, (labour market) training, private sector employment incentives, and public sector employment.[118] With regard to job search assistance, these are programmes that aim to facilitate the transition of the unemployed individual back to employment. Jochen Kluve observed that these schemes, which are run by the governmental authorities, are low-cost.[119] In contrast, the Governmental authorities seem more tempted to invest in labour market training.[120] With regard to private sector incentive programmes, the core mandate is to create incentives for employers to recruit and/or retain their existing employees, for example by wage subsidy.[121] Lastly, employment programmes in the public sector, which usually last for a short period, are costly for the governmental authorities.[122]

As employability policies (ALMPs and LLL) are generated and developed at domestic level, States can reflect the peculiar characteristics of their own labour market and tackle their concurrent challenges. In this context, the absolute discretion, which is left to Member States, might create problems as to universal application of flexicurity policies. It seems that employment status plays a decisive role in accessing both ALMPs and LLL. Although the

[116] Ashiagbor (n.112), p.38.
[117] EC 2007 Communication on Flexicurity (n.23).
[118] Kluve J., ILO Research Department, Working Paper 9: 'A review of the effectiveness of Active Labour Market Programmes with a focus on Latin America and the Caribbean' March 2016, p.3.
[119] Ibid.
[120] Ibid.
[121] Ibid, pp.4-5.
[122] Ibid, p.5.

principle of universality entails employment opportunities for everyone, there are concerns over the types of employment to which employability policies are applied. In the 2007 Communication, the EC recognised that temporary workers are often excluded from employability programmes.[123] It seems that the root cause for excluding specific categories of workers is dependent on the funding body of the programme. Employers are generally interested in improving the competitiveness of their company and reducing their cost however, some employers appear reluctant to invest in LLL because they fear that workers that participate in training schemes, which are funded by the enterprises, can be recruited by other employers.[124]

LLL is in the interest of both workers and employers – for workers, as an opportunity to increase their skills and avoid the risk of being exposed to unemployment and poverty and for employers, to increase competitiveness of their company. Taking into consideration the 2007 Communication where the EC observed that LLL strategies are primarily focused on high-skilled workers, it seems that employers tend to invest only when there is limited risk.[125] Employers could limit the risk of losing money by requiring employees to stay for period after training or pay back a proportion of course fees if they leave. This might raise issues regarding the discretion that is left to individuals to decide whether they want to participate in the programme. If the worker is required to attend a training programme outside working hours, there might cause problems to individuals that have family responsibilities (such as take caring of old-people, single parents), to individuals that have two or more jobs or to workers with pro rata salary, since participation in a training programme could reduce the amount of their salary. Even in cases where training is provided within working hours, travelling expenses and distance are two factors that shall also be considered for facilitating workers to get access to the educational and vocational training programmes. High-skilled workers seem to be those who are less likely to be subjected to dismissal. Eurostat statistics indicate that the rate of unemployed people in the EU, who had only primary or lower secondary education, reached 14.8% (in 2017).[126] Whereas, the rate of unemployed people in the same year, who finished upper secondary or post-secondary non-tertiary education, is below 7%.[127]

[123] EC 2007 Communication on Flexicurity (n.24), p.14.
[124] Ibid, p.6.
[125] Ibid.
[126] Eurostat official website, <https://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tepsr_wc140&language=en> accessed 12 January 2019.
[127] Ibid.

Inevitably, being registered as unemployed can give an individual access to ALMPs. It seems that there is problem in cases of partial employment and partial unemployment. In these cases, there are situations where individuals are not registered as unemployed and their income is very low. This means individuals are excluded from ALMPs programmes and they are trapped in low-income employment. This is linked to the idea that the ALMPs should set as an aim not just to tackle unemployment, but to increase employability of individuals and help them to get a decent job. There are also situations where individuals are registered as unemployed even if they keep their jobs (this phenomenon is known as 'hidden unemployment'). The role of ALMPs shall be emphasized at this point, since ALMPs shall create incentives to individuals to obtain an 'official' job, so that 'hidden unemployment' will be tackled and the risk of exposing individuals to poverty will be avoided.

The creation of 'incentives for workers and employers' could play a dominant role in the realization of LLL.[128] The EC speaks of 'incentives' but, it does not set out any indicators, principles or conditions that shall be considered in their determination. To explain, it does not specify who shall introduce these incentives, which criteria shall be met in their determination, who shall act as the funding body of these incentives and which body shall have the supervisory role in order to assess the quality of these programmes and the role of enterprises in their realization. For employers, 'financial contributions and tax credit' could motivate them to engage more actively in the realization of LLL.[129] In this context, there are concerns over the effectiveness of LLL strategies and the actual role of employers. It seems that there could be problems in cases where these incentives prompt the employer to participate but do not actively engage the employer in the effective application of LLL. For example, the employer could officially accept participation in the scheme and gain the benefits, however, the employer could still appear reluctant to provide adequate training to employees by giving them time off work, for example. This means participation in these schemes will not improve employees' skills and employers would reduce the risk to invest in an employee that will be recruited by another employer. It seems that a supervisory body, such as the public employment services (PES), could ensure the effective application of LLL. However, it might not be easy to convince an employer to invest and engage in LLL if the application of the LLL will be supervised by another body.

[128] EC 2007 Communication on Flexicurity (n.24), p.14.
[129] Ibid.

Cost sharing between different stakeholders, such as public authorities, workers, enterprises and social partners, could also prompt interested parties to participate in the realization of employability policies.[130] Whereas, ALMPs are mainly promoted by the governmental authorities in order to tackle unemployment and enhance employability of job-seekers.[131] This does not mean that governmental authorities shall act on their own in order to foster employability. The PES, acting as 'active promoters, strategic partners and/or coordinators', could develop employability programmes so that employers could recruit employees under these schemes, pay a proportion of their salary and cover their needs.[132] This is particularly beneficial in cases where employers struggle to recruit new members of staff due to a shortage of money. In this context, it is important to acknowledge that the realization of ALMPs and LLL could increase employability skills of workers and tackle poverty. These schemes need not be intended to just create a vicious circle of short-term recruitment and exposure of workers to unemployment. Regarding ALMPs, public authorities can play the role of the supervisory body so that this will be avoided, whereas, in cases of LLL, it would be more efficient to accredit an independent body that would also take the role of the mediator.

2.3.3 Social dialogue and collective bargaining

The design and implementation of flexicurity policies have been linked to the idea of social dialogue. Among the Common Principles of Flexicurity, the EC denoted the decisive role of social actors in the design and implementation of flexicurity policies.[133] In the EU discourse of flexicurity, social dialogue is promoted as an over-arching method that could create a climate of trust among the interested parties and make them reach a consensus. Building an environment of trust, the social partners would be given the opportunity to strike a right balance between their rights and responsibilities.[134]

Before assessing the role of social dialogue in the spectrum of flexicurity, it is important to understand the conceptualisation of 'social dialogue' and detect any complexities at EU and ILO regimes. Predominantly, social dialogue is recognized as a core principle in both regimes.

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[130] Ibid, p.6.
[131] ILO Research Department, Working Paper 9: 'A review of the effectiveness of Active Labour Market Programmes with a focus on Latin America and the Caribbean' (March 2016) < https://www.ilo.org/wcmsp5/groups/public/@dgreports/@inst/documents/publication/wcms_459117.pdf> accessed 24 April 2019, pp.1-2.
[132] Andersen T., and others, 'The role of the public employment services related to 'flexicurity' in the European labour markets' (2009) *Journal of The European Economic Association*, p.8.
[133] EC 2007 Communication on Flexicurity (n.24), p.9, principle n.7.
[134] Ibid, p.8.

Article 151 TFEU recognized it as a core principle for the promotion and respect of social rights, referring to 'dialogue between management and labour'.[135] Whereas, the ILO defined 'social dialogue' as all forms of 'negotiation, consultation or exchange of information between or among' public authorities, employers and workers.[136] The ILO Declaration of Philadelphia of 1944 has recognized the right to collective bargaining and, instead of using the term 'social dialogue', made reference to 'cooperation of management and labour' and 'the collaboration of workers and employers'.[137]

In the EU regime, social dialogue contributes to the development of EU social policies and takes the form of tripartite (social actors and EU institutions) and bipartite dialogue (employers organizations and trade unions).[138] The Council Decision 2003/174 established the Tripartite Social Summit for Growth and Employment, which is 'the highest level of tripartite social dialogue' as part of cross-industry dialogue.[139] According to article 3 of Council Decision 2003/174, the Council of Presidency and the two subsequent Presidencies, the EC and the social partners shall participate in the Tripartite Social Summit.[140] The Ministers of the Presidencies and the Commissioner on Labour and Social Affairs could also participate in the Summit.[141] It is important to note that the number of worker's representatives (maximum of 10 people) shall be equal to the number of employers' representatives that participate in the Summit.[142] Apart from the Summit, there are also a number of tripartite Advisory Committees, such as the European Social Fund Committee, in which 'European social actors are able to play an informal coordination role'.[143]

With regard to bipartite dialogue, the Social Dialogue Committee, which was established in 1992, brings together social partners and representatives of national member organisations (such as European Trade Union Confederation (ETUC) as workers' organization representative and UNICE as employers' organization representative) in order to discuss and negotiate issues

[135] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), article 151.
[136] ILO official website, <http://www.ilo.org/ifpdial/areas-of-work/social-dialogue/lang--en/index.htm> accessed 6 December 2018.
[137] ILO Declaration of Philadelphia 1944 (26th ILC session 10 May 1944), Part III (e).
[138] Commission of the European Communities, Communication from the Commission on Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue COM (2004) 557 (EC Communication 2004 on Social Dialogue).
[139] Council Decision 2003/174 of 6 March 2003 established the Tripartite Social Summit for Growth and Employment [2003] OJ L70/31.
[140] Ibid, article 3.
[141] Ibid.
[142] Ibid.
[143] EC Communication 2004 on Social Dialogue (n.138), pp.4-5.

of common interest in the field of labour and social affairs.[144] The EC Decision 98/500 introduced the Sectoral Dialogue Committees, which shall consist of representatives of the social partners (i.e. national organizations that can conclude agreements).[145] The Communication concerning the application of the Agreement on social policy (1993) sets out a list of criteria that need to be fulfilled to determine if an organization is able to participate in consultations based on article 154 TFEU.[146] Such an organization shall be a national representative of 'cross-industry or relate specific sectors or categories' that is able to 'negotiate agreements' and has 'adequate structures' that would facilitate its participation in the consultation process.[147]

Social actors shall submit an opinion or a recommendation to the Commission, as a form of consultation to the EC before any proposal submission on social policy (article 154(2)-(3) TFEU). According to article 155 TFEU, social actors may conclude an agreement and either implement this based on their domestic rules or jointly ask the Commission to submit the proposal to the Council which is responsible to adopt a decision on implementation – known as 'autonomous agreements' (article 155(2) TFEU). In cases where social actors failed to reach an agreement, then the Commission will still be able to take into account the issues raised by the social actors.

Apart from bilateral dialogue, the EU Directive 2009/38 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees promotes bipartite social dialogue in enterprise-level.[148] The over-arching aim of Directive 2009/38 is to 'improve the right to information and consultation of employees in Community-scale undertakings and Community-scale groups of undertakings'.[149] The Directive is applicable only to a specific

[144] Ibid, p.11.
[145] Commission Decision 98/500 of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level [1998] OJ L225/27, article 1(b).
[146] Commission of the European Communities, Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and to the European Parliament [1993] COM (93) 600, article 7.
[147] Ibid.
[148] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) [2009] OJ L122/28 (Directive 2009/38) - it promotes bipartite social dialogue in enterprise-level, article 2(c); Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [1994] OJ L254/64.
[149] Directive 2009/38, article 1(1).

category of multi-national enterprises (i.e. with minimum 1000 employees within the Member States and two group undertakings in different Member States, of which each of the undertakings will have minimum 150 employees).[150]

In the ILO regime, social dialogue can be tripartite (governmental authorities, workers' and employers' representatives) and bipartite (workers' and employers' representatives). In regards to tripartite social dialogue, ILO Convention on Tripartite Consultation (International Labour Standards) of 1976 (N.144) established that workers' and employers' representatives which are entitled to participate in the consultation process regarding specific activities of the ILO (as subscribed in article 5 of ILO Convention N.144) are 'enjoying the right of freedom of association'.[151] Tripartite social dialogue appears in various forms, which include exchange of information, consultations (i.e. 'ask the opinion of the other parties and give them the opportunity to respond') and negotiations (i.e. discussions which aim for the conclusion of agreement).[152]

In this context, bipartite social dialogue takes the form of 'collective bargaining', which could be conceived as tougher collective bargaining compared to EU bipartite social dialogue (i.e. discussions, exchange of information and negotiations among workers' and employers' representatives). ILO Collective Bargaining Convention of 1981 (N.154) defined 'collective bargaining' as 'all negotiations' between employers' and workers' organizations. These negotiations shall resolve issues on: a) employment terms and conditions, b) regulation of employment relationships between: i) employers and workers or/and, ii) employers or employers' organizations) and workers' organization(s).[153]

Social dialogue could contribute to the realization of flexicurity policies, because it could resolve the power imbalances between the actors, however, there is still confusion around the form that it shall take. Through the lens of the EC, it is obvious that national authorities have absolute discretion to decide the form of social dialogue.[154] The over-arching aim of this

[150] Directive 2009/38 promotes bipartite social dialogue in enterprise-level, article 2(c).
[151] ILO Convention N.144: Convention concerning Tripartite Consultations to Promote the Implementation of International Labour Standards (61st ILC session Geneva 21 June 1976), articles 1 and 5.
[152] International Labour Office, Social Dialogue and Tripartism Unit, Governance and Tripartism Department, 'National Tripartite Social Dialogue: an ILO guide for improved governance' (Geneva 2013), p.24.
[153] ILO Convention N.154: Convention concerning the Promotion of Collective Bargaining (67th ILC session Geneva 3 Jun 1981), article 2.
[154] See more concerning collective bargaining models and unemployment benefits in de le Court A, 'Collective Bargaining on Social Protection in the Context of Welfare State Retrenchment: The Case of Unemployment Insurance' in López López J (ed) *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century?* (Hart Publishing 2019).

discretion is to give the opportunity to the Member States to reflect the socio-economic situation of each Member State and represent the interests of all parties in their own national flexicurity pathway.[155] For example, in the flexicurity national pathway 4 that was proposed by the EC and aims to facilitate the transition from informal to formal employment, collective bargaining is promoted as the method that the national authorities shall use to help employers understand the advantages of in-job training and convince them to seriously consider investing in such training schemes for their workers.[156]

It seems that interests of workers would be better represented through collective bargaining (ILO model) than mere information and consultation (EU model) that could neglect their interests. Collective bargaining enables the employers and workers to develop a constructive relationship and through this continuing dialogue both parties can engage in the decision-making process so that the policies would reflect their interests, addressing issues on an equal standing.

It seems that even the concept of collective bargaining has developed its own peculiarities in each domestic system. Eichhorst et.al, in their 2011 study, which was submitted to the EP, explained that the idea of collective bargaining is not homogenously conceived among EU Member States.[157] According to the 2010/2011 Study on the Implementation of the Flexicurity Concept in the EU24, the role of social dialogue in the realization of flexicurity policies is overemphasized since the effectiveness of flexicurity policies at domestic level is strictly dependent on the level of social dialogue between social actors.[158] The 2010/2011 Study, which showed that the density and level of social dialogue differs from country to country, characterized the role of social dialogue as 'weak or symbolic' because some Member States did not embrace the idea of social dialogue in the determination of their flexicurity policies.[159] It has distinguished the Member States based on the role of social dialogue in developing and enforcing flexicurity policies at domestic level, showing that social dialogue varies from

[155] EC 2007 Communication on Flexicurity (n.24), p.13.
[156] Ibid, p.8, flexicurity pathway 4.
[157] IZA Research Report, Eichhorst W., Kendzia M.J. and Vandeweghe B., 'Cross-border collective bargaining and transnational social dialogue' (June 2011) <http://ftp.iza.org/report_pdfs/iza_report_38.pdf> accessed 12 August 2019, p.10; it could be broadly defined as 'a process between unions and employers regulating the terms and employment conditions of employers'.
[158] ICF GHK to European Commission, Directorate-General Employment, Social Affairs and Equal Opportunities (VC/2011/0682), Report: 'Evaluation of flexicurity (2007-2010): final report' (30 October 2012) (Evaluation of flexicurity 2012), pp.36-37.
[159] Ibid.

country to country.[160] For example, social partners did not reach a consensus on flexicurity policies and subsequently, the Government of Spain adopted on its own the content for flexicurity policies in Real Decree 2/2009.[161] Whereas, the social partners in Germany were actively involved in the adoption of flexicurity policies for internal flexicurity and employment security.[162]

2.3.4 Concluding Remarks

The idea of flexicurity through the lens of the EC, entails a shift from job security to employment security. As regards the textual confusion around employment-job security, the absence of a clear distinction between the two concepts might leave room to the States to adjust it on their own domestic needs. Apart from this textual confusion, there is also a significant problem because employment security does not necessarily follow a facilitation of dismissals. The issue becomes more complex because the enforcement of ALMPs, which are deemed as the 'driving force' from unemployment to employment, or from one job to another, is strictly dependent on their funding bodies. Hence, there is an interplay among interested actors that are willing to make their interests be represented through these flexicurity policies. It seems that the 'golden recipe' of this realization is social dialogue. Through social dialogue, all the interested parties are brought together and make effort to reach a consensus around issues of flexicurity. However, if this social dialogue takes the form of discussions and information and consultations (without meaningful negotiations), it is very likely that flexicurity policies could lead to a 'race to the bottom', increase poverty and unemployment levels and exacerbate social exclusion; whereas, collective bargaining would enable the employees and workers to be heard and more effectively negotiate their interests during the process. These complexities of flexicurity ingredients demonstrate that the idea of flexicurity still remains an idealistic policy that is 'intangible' in practice. It further shows that standard-setting actors (the EU, the ILO and governmental authorities) play a dominant role in the effective application of flexicurity policies, so that flexicurity will not become identical to employment insecurity and poverty.

[160] Ibid. The Study distinguished States into three categories: States which recognized that social dialogue shall play a significant role in the realization of flexicurity at domestic level, those where social dialogue plays a role and those where social dialogue is almost existent or non-existent at all.
[161] Evaluation of flexicurity 2012 (n.158), p.39.
[162] Ibid, p.38.

2.4 Flexicurity and reflexivity

This section focuses on the theoretical domains of reflexive law and Luhmann's theory of autopoietic systems. The first section explores the main features of reflexive law, which include functional differentiation and proceduralization. The second section deals with reflexivity and flexicurity, which are not necessarily deregulatory. It explores the reflexive communication between employment protection and social security systems, as integrated in the idea of flexicurity. Since this research study aims to explore the relationship between employment security and social security, this section attempts to explore how reflexive law sees the communication (function and performance) of these systems. It is particularly important to understand the theoretical (reflexive) foundations of this relationship, before examining their performance and detecting their systemic limits at international (ILO), regional (EU/CoE) and domestic (using the case of Cyprus) levels.

2.4.1 Introduction to reflexivity

The domains of reflexive law theory were introduced by Gunther Teubner, a German legal scholar, who examined the evolution of law and 'rematerialization of law'.[163] Reflexive law aims to coordinate different self-regulatory systems, which are also described by Teubner as 'forms of social cooperation'.[164] In his article 'Substantive and Reflexive Elements in Modern Law', Teubner explored the concept of 'legal rationality' and defined its three consisting parts: formal, substantive and reflexive rationality.[165] Teubner has referred to Habermas to explore the differences between the three types of legal rationality, which are: the norm, the system and the internal rationalities.[166] He thereby attempts to explain the way that 'legal norms should govern human actions' through 'norm rationality or justification of law'.[167] 'System rationality or external functions of law', which is the second constituent part of legal rationality, means the extent to which law is capable to 'respond' to societal problems.[168] Reflexive law, which 'structures and re-structures' the self-regulatory systems, embeds in the concept of 'decentralized integration'.[169] This means integration into these self-regulatory systems is facilitated by establishing 'supporting integrative mechanisms' that do not prescribe

[163] Teubner G., 'Substantive and reflexive elements in modern law' (1983) 17 *Law & Soc'y Rev.* 239, p.240.
[164] Ibid, p.254.
[165] Ibid, pp.251-252.
[166] Ibid, p.252.
[167] Ibid.
[168] Ibid.
[169] Ibid.

authoritative means of regulation.[170] It is important to understand the difference between the concepts of decentralization, which entails to devolution of governmental control from a single place to several ones, and deregulation, which means the process of removing government controls from a business or other activity.[171]

As social systems are distinctly different from 'natural social orders', reflexive law attempts to 'design' these self-regulatory systems through procedural norms.[172] The social systems encompass 'processes, organization, and the distribution of rights and competencies'.[173] The regulation of all these elements is achieved through 'indirect and abstract' procedural norms, also known as 'proceduralization'.[174] According to Teubner, the idea of 'internal rationality' or 'internal structure of law' has important procedural dimensions.[175] This idea refers to the creation of 'general conceptual categories' and arrangement of law in a system, which is characterized as 'the systematization of doctrine'.[176]

The reflexive law theory is based on the Luhmann's theory of autopoietic systems. According to the sociological theory of autopoietic systems, a system, such as the legal system, is simultaneously 'normatively closed' and 'cognitively open'.[177] With regard to law, normatively closed system means that the legal system produces its own internal rules, which are called 'elements'.[178] The legal system, as a self-referential system, is only capable to 'lend normative quality' to its elements.[179] In other words, the production of internal legal rules ('self-production') can only be accomplished by the legal system itself – i.e. 'only law can produce law'.[180] These 'self-referential systems' are capable of communication with their internal elements (i.e. internal interaction), however, they cannot communicate with the other systems (i.e. interaction with their environment).[181] Because of this 'closedness', the internal

[170] Ibid.
[171] Cambridge dictionary official website <http://dictionary.cambridge.org/dictionary/english/decentralize?q=decentralization> and <http://dictionary.cambridge.org/dictionary/english/deregulation> accessed 6 December 2018.
[172] Teubner (n.163), pp.254-255.
[173] Ibid, p.255.
[174] Ibid.
[175] Ibid, p.252.
[176] Ibid.
[177] Luhmann N., 'Operational closure and structural coupling: the differentiation of the legal system' 13 *Cardoso Law Review* (1992) 1420, p.1420.
[178] Ibid.
[179] Luhmann N, *A sociological theory* (King-Utz E. and Albrow M. (trs), Albrow M. (ed), 2nd edn, Routledge 2014), p.283.
[180] *Ibid.*, p.282; Rogowski (n.1) p.33.
[181] Teubner G., 'Autopoiesis in law and society: a rejoinder to Blankenburg' (1984) 18(2) *Law and Society Review* 83, p.88.

elements of the legal system are developed in relation to its external environment (i.e. 'cognitively openness').[182] In these terms, the legal system produces internal rules that will enable it to become reflexive and 'cope' with functionally differentiated autopoietic systems.[183]

Since the legal system, as a self-referencing autopoietic system, produces its own internal elements, reflexive law is embedded in the idea of 'increasing legalization', instead of 'delegalization'.[184] The 'quality of this legalization' can be changed because the internal legal elements are adaptable to the norms of other systems in order to facilitate the interaction between different social systems.[185] It is important to understand how the concept of flexicurity encompasses this idea of 'legalization', which means obligatory authorization, rather than 'delegalization', which means removal of obligatory authorization. For example, the EES-employment guidelines (in particular, Integrated Guidelines 16 and 20 that integrate aspects of flexicurity), which are analysed in section 2.2.2, set out common principles that EU Member States shall adopt at domestic level. Although these principles might take the form of hard-law or soft-law (through indirect means – e.g. social dialogue), the governmental authorities by integrating these principles give to different actors (e.g. trade unions, social actors) official permission to adopt flexicurity policies that would make workers more adaptable to labour market changes.

Reflexive structures are the main mechanisms that facilitate integration with social systems as societies have become 'functionally different' because of the over-production of norms and values within a system.[186] These reflexion structures are capable to mediate and 'reconcile tensions between function and performance' of social systems.[187] In order to mediate collisions between function (i.e. function of the whole system) and its 'input and output performances' with other systems, reflexion structures impose limits on function and performance.[188] The reflexivity of legal system is identified in Teubner's articulation that law encompasses the 'structural premises for reflexive processes' in other systems.[189]

[182] Ibid.
[183] Ibid, p.91.
[184] Ibid, p.92.
[185] Ibid.
[186] Ibid, p.273.
[187] Ibid.
[188] Ibid, pp.272-273.
[189] Ibid, p.275.

Rogowski and Wilthagen introduced the theory of reflexive labour law to explore the complexities of labour law system.[190] This labour law theory explores the elements that the labour law systems produces to regulate itself (i.e. self-regulatory capacities).[191] Apart from this, reflexive labour law also examines the performance of the labour law system with other social systems, such as the economy and industrial relations, and detects its 'systemic limits' with regard to regulation of other social systems.[192]

The core elements of labour law system are communications, which Rogowski and Wilthagen conceived as 'the autopoietic basis of reflexive labour law'.[193] The term 'communication' describes genuine information-sharing, which means the elements of labour system do not take the form of 'interactions' (i.e. action-reaction).[194] On the basis of 'self-modelling', which was primarily developed by Ladeur and further applied to the field of labour law by Rogowski, legal communications are assisted by other self-regulatory systems, such as the autopoietic system of industrial relations.[195] For example, the emergence of collective bargaining as a negotiating method between interested parties in the system of labour law, derives from the autopoietic system of industrial relations.[196] In this context, the communication of legal system with other self-regulatory systems leads to 'the internal differentiation of the legal system' and the design of other sub-systems.[197] For this purpose, the labour system, an autopoietic system of 'communications', constitutes a sub-system of the legal system and reflects these 'new forms of legal communication' with other systems.[198]

The internal and external complexities of the labour legal system, which need to be effectively addressed, are connected to the idea of 'deregulation of labour law'.[199] In terms of 'reflexive deregulation', deregulatory policies aim to strike a fair balance between the reduction of internal complexities of the labour law system (that are to facilitate its function) and reaching wider social goals that are related to its environment (so as to make its performance more effective).[200] According to Rogowski, reflexive deregulation, which can be characterized as 'a

[190] Ralf Rogowski and Ton Wilthagen, *Reflexive Labour law* (Kluwer Law and Taxation Publishers 1994).
[191] Ibid, pp.7-8; Rogowski (n.1), p.39.
[192] Ibid.
[193] Rogowski and Wilthagen (n.190), p.16.
[194] Ibid.
[195] Rogowski (n.1), p.40.
[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] Ibid, p.48.
[200] Ibid.

form of regulation for self-regulation', aims to ease systemic complexities.[201] In this context, reflexive deregulation shall complement reflexive re-regulation in order to strike the right balance between flexibility and security.[202] In other words, deregulatory policies could be described as 'the means' for achieving the over-arching aim of re-regulation.

Someone could argue that flexicurity, as a policy tool, removes government controls and offers the equivalent to social actors. Rogowski characteristically observed that flexicurity constitutes 'a strategy of reflexive deregulation'.[203] However, it seems that such an argument describes only a part of the idea of flexicurity. Regarding social security that constitute one of the core components of flexicurity, governmental authorities are the ones that adopt the legal framework. In this context, social actors, such as workers' and employers' representatives, can negotiate and detect any problems or improvements that are needed. Then, these negotiations could be communicated to governmental authorities and get the formal approval so that systemic procedures could be changed. Similarly, the dismissal rules (denoting that flexicurity aims to facilitate employment transitions while ensuring employment security) are decided by governmental authorities. These rules include also deregulatory policies which give room to enterprises and social actors to restructure an employment security system.

Since reflexive labour law entails a shift from substantive to procedural law, these self-referential communications are also regulated by 'mechanisms of interest coordination'.[204] The labour law system provides the legal framework for establishing these mechanisms of self-regulation.[205] In this context, the legal instruments are conceived as 'procedural devices' for self-regulation rather than 'external control'.[206] In other words, reflexive law uses indirect means of regulation, such as collective bargaining.[207] These mechanisms of interest coordination, which entail an interplay of different actors that seek to cover their needs, are particularly interesting with regard to flexicurity and distribution of power/balances (this point will be analysed further in the next section).

[201] Ibid, p.170.
[202] Ibid, pp.170-171.
[203] Ibid, pp.130-131.
[204] Rogowski and Wilthagen (n.190), pp.7-8.
[205] Ibid, p.16.
[206] Rogowski (n.1), p.97.
[207] Ibid.

2.4.2 Communication between employment security and social security

The current research project is focused on the reflexive relationship of regulation between employment security and social security systems. According to Chantal Thomas, the development of different sub-systems, which reflects on the theory of legal pluralism, has led to a debate.[208] On one hand, there is the proposition that the international community responds with 'consolidation' to the existing divergence between the 'self-contained systems'.[209] Whereas, the opposite argument sets forth that the problem of 'doctrinal divergence' is solved through 'normative convergence', which means through 'customary international law, national implementation processes and state cooperation'.[210] Flexicurity, as deregulatory policies, could bridge the normative chasm that exist between the two systems. In the 2007 EC policy document, flexicurity entails a shift from job security to employment security, while providing adequate social security benefits.[211] To explain, an employment security system aims to facilitate employment transitions, which might entail removal of job protection. During this transition, a social security system acts as a safety net, providing unemployment and educational (ALMPs) benefits.

In the Wilthagen matrix, the concept of flexicurity encompasses internal and external types of flexibility. Regarding internal flexibility, effective communication or the performance of employment security and social security systems could enable individuals to retain their job position. Whereas, favouring external flexibility, which is related to the transition from one job to another, the unemployment benefit shall act as protection and prevent individuals from being exposed to the risk of poverty and unemployment.

The question which arises is to what extent flexicurity, as a form of re-regulation that also embraces deregulatory policies, could promote job security through reflexive interaction between employment security and social security systems. Job security protections respond to the social security system, which acts as a safety net in different cases and contingencies (such as employment injury, medical care, maternity and family responsibilities) so that a worker will be able to overcome the risk and return to the job position. In the spectrum of employment security-social security systems, promotion of job security could be achieved through deregulation. Removing governmental controls from regulating employment security could

[208] Thomas C., 'Convergences and Divergences in International Legal Norms on Migrant Labor Chantal' (2011) 32 *Comparative Labour Law and Policy Journal* 404, p.440.
[209] Ibid.
[210] Ibid.
[211] EC 2007 Communication on Flexicurity (n.24).

enable social actors (e.g. enterprises, trade unions) to negotiate the terms of employment so that the worker could be adaptable to labour market changes and stay in a job. According to the EC, one of the core components of flexicurity is to secure contractual arrangements and make them more flexible.[212] In other words, promotion of job security does not necessarily mean that it would impede employment transitions.

Where the concept of flexicurity, which focuses on employment transitions, did not encompass at all the concept of job security, workers would transition easily from one job to another, but they wouldn't be given any protection of their ability to retain a job. In contrast, flexicurity aims to make workers adaptable to labour market changes in order to be able to either retain a particular job or transition to another job. As to proceduralization, adaptability of workers could be achieved *inter alia* through flexicurity deregulatory policies. For example, ALMPs and LLL (core components of flexicurity), which are mainly regulated by social actors (e.g. enterprises), could enable workers to retain a job. In cases where this is not possible for workers, flexicurity policies would enable workers to transition to another job.

Reflexive interaction of employment security and social security seems to promote employment transitions in order 'to engender responses' to internal and external complexities and attain wider social goals – for example, to foster employability and eradicate poverty.[213] 'Proceduralization' forms the basis of reflexive interaction among systems. The Open Method of Coordination (OMC) constitutes one the main soft-law procedures of regulating flexicurity policies. According to article 5 TFEU, the EU is competent to 'provide arrangements within which EU Member States must coordinate policy' in the fields of employment policy and social security. The OMC provides the regulatory framework (procedures) in order to adopt flexicurity policies, while at the same time facilitate and respect domestic regulation procedures.[214]

The regulation of job security and social security at domestic level, which constitute two of the main flexicurity components, is dependent on hard law. Regarding job security, the norms for employment protection against unfair/ arbitrary dismissal normally take the form of hard law (e.g. convention or legislative act). In case of Cyprus, the Termination of Employment Law,

[212] Ibid, p.5.
[213] Barnard C., Deakin S. and Hobbs R. 'Reflexive law, Corporate Social Responsibility and the evolution of labour standards: the case of working time' ESRC Centre for Business Research, University of Cambridge, Working Paper N.294 <https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp294.pdf> accessed 3 April 2019, p.5.
[214] Rogowski (n.1), p.197.

which was enacted on 27 May 1967 and entered into force on 1 February 1968, sets out the conditions for the termination of employment.

It seems that there might be problem with the protection of individuals in cases where flexicurity deregulatory policies, (which in the specific case means removal of government controls from regulation of employment security and social security policies) do not provide any procedures through which the individual could enforce his or her legal entitlements. This is because regulation, which is removed from the governmental authorities, is left to policy-based measures.

At this point, the question which arises is how power imbalances that exist in employment relationships are accommodated within proceduralization. The power to prevent dismissal derives from 'the perceived ability and willingness to impose costs'.[215] The lack of enforcement creates room for greater power imbalances. For example, if employees' termination cost is high, the employee is likely to be reluctant to terminate the employment contract to avoid to pay the cost.[216] In such a case, if the worker cannot enforce his or her entitlements, it means that the worker has two options: either to remain unwillingly in that particular job position, which could leave the worker trapped into jobs or pay the costs and terminate employment. If a worker decides to do the latter (i.e. pay the costs and terminate employment) this exposes the worker to the risk of unemployment. On the other hand, an employer could also decide to reduce the costs for termination of employment, ease the procedures and hire cheap labour. This flexibilization of the labour market procedures could leave workers exposed to unemployment and lead to a race to the bottom of labour standards.

The power imbalances regarding flexibility and security, which exist among interested actors (e.g. employers, government and employees), could be regulated through procedural aspects of systems. In this research study, these procedures entail the different interactions of employment security and social security systems through legal instruments and policies. In order to handle power imbalances, it is important to constrain the powers of certain actors. This could be achieved through social dialogue that could bring all interested parties together to communicate their interests. In this context, it is important to note that the form of social

[215] Hogbin G. 'Power in employment relationships:is there an imbalance' (2006) <http://archive.hrnicholls.com.au/articles/hrn-hogbin1.pdf> accessed 12 August 2019, p.11.
[216] Ibid, p.19.

dialogue matters a lot because if social dialogue does not truly enable actors to express their beliefs, the power imbalances could be reflected in the scope of social dialogue.

Reaching a consensus on flexicurity policies could be achieved through social dialogue. Catherine Barnard et al. expressed the view that reflexive law can prompt attempts to 'deregulate rule-making authority to self-regulatory mechanisms' through social dialogue.[217] With regard to the strategy of the OMC, the relevant stakeholders are entitled to reach a consensus also through social dialogue. The participation of the interested actors shall play a crucial role in order to represent their interests and ensure effective communication between employment and social security systems. In this context, it is not clear whether social dialogue means collective bargaining or genuine negotiations among stakeholders. Regarding genuine negotiations (EU model of social dialogue), social dialogue might involve social actors and EU institutions (tripartite dialogue) or employers' organizations and trade unions (bi-partite dialogue). It seems that the interplay of social actors might not be able to manage power imbalances, which already exist in the systemic performance and function. If social dialogue takes the form of collective bargaining (ILO model of social dialogue), it is more likely that the actors will have equal bargaining power and they would be able to change the existing procedures.

The concept of flexicurity entails procedures through which actors are capable to pursue their interests.[218] The transitional labour market, which entails a swift transition from one job to another, relies on the idea of 'win-win situation'.[219] This idea refers to cases where flexicurity policies aim among others to persuade both employers and workers that they can be benefited from the transitional labour market.[220] Employers, putting efforts to make their company more adaptable and reduce their exposure to risks, might need to implement employability policies (ALMPs and LLL) to increase adaptability skills of their employees. On the other hand, workers seek to remain in the labour market and receive proper social security benefits that would avoid the risk of being exposed to poverty.

[217] Barnard and others (n.213), p.30.
[218] EC 2007 Communication on Flexicurity (n.24), p.39.
[219] Rogowski (n.1), p.130; Report by the European Expert Group on Flexicurity, Flexicurity pathways: Turning hurdles into stepping-stones' (June 2007) <https://pdfs.semanticscholar.org/7276/a90e45bfa005dbe19dc3620276ebb4377965.pdf?_ga=2.81347280.614432989.1565634277-766709918.1547316014> accessed 12 August 2019, p.39.
[220] Rogowski (n.1), p.130.

In the absence of a 'pre-determined outcome', interested actors attempt to design flexicurity in a manner that would cover their interests.[221] The view of Pochet is very interesting as he observed that the adoption of the OMC shifts the focus from 'traditional actors' (i.e. EU institutions) to social actors.[222] This view illustrates the idea of deregulation as a means to achieve re-regulation. In the context of this research project, these actors are the international-setting actors (ILO), regional mechanisms (EU institutions, CoE), social actors (representatives of management and labour), governmental authorities and enterprises/companies. The latter might give the impression that the responsibility to resolve these complexities is shifted from judicial courts to the interested actors. Rogowski observed that the shift from judicial courts to social actors illustrates the main feature of reflexivity, where social systems are 'regulated through self-determination'.[223] Although he articulated the view that the traditional route of judicial courts is supplanted with indirect means of regulation, it seems that judicial means are complementary to indirect means of regulation. For example, the right to collective bargaining, which is enshrined in binding legal instruments, can be claimed through a judicial route, such as the ECtHR.

2.4.3 Concluding Remarks

Employment security and social security systems, as cognitively open self-regulatory systems, can be mutually reinforced (in other words, communicate between each other) to attain wider social goals, for example to tackle unemployment and eradicate poverty. These social self-regulatory systems, which produce procedures, communicate with each other. This thesis will examine the implications of interaction between employment security and social security systems for job security. Although the Commission has referred to a transition from job to employment security, it appears that flexicurity policies could make workers more adaptable to labour market changes in order to retain a job. It seems that flexicurity and reflexivity encompass the concept of deregulation, as a consisting part of re-regulation. In this context, the thesis shall examine how social dialogue can be integrated in the proceduralization framework, ideally taking the form of collective bargaining to handle power imbalances among certain actors.

[221] EC 2007 Communication on Flexicurity (n.24), p.39.
[222] Rogowski (n.1), p.197.
[223] Ibid.

2.5 Conclusion

This chapter has examined the theoretical domains of reflexivity and flexicurity, which act as a framework for analysis in the rest of the thesis. The concept of flexicurity, as an equilibrium of flexibility and security, synthesises many ingredients to ensure that individuals can remain in the labour market. The EU 'ingredients' of flexicurity, which were introduced by the EC in the EES, are complex and create controversies. The so-called shift from job security to employment security was unfortunately turned into debates over social security and employability. The terms of employment security and job security remain ambiguous. The facilitation of dismissals is often conceived as removal of job protections, which is linked to 'the race to the bottom' in cases where employers can easily dismiss an individual and the system fails to secure swift transitions of workers in the labour market. This is what happens when employment and social security systems are under-developed or inadequate.

Employment security and social security are conceived as two separate self-referential systems, whose convergence could be eased by flexicurity policies. Flexicurity is often characterized as a 'win-win situation'.[224] Different types of social dialogue could ease the tensions and mediate the arising collisions, seeking for a balanced solution. Social dialogue might take the form of negotiations (EU model of social dialogue) or collective bargaining (ILO model of social dialogue). Flexicurity entails deregulatory mechanisms for re-regulation, which means that all interested actors theoretically can participate in the creation of standards, which are more likely to be procedural than substantive. In the following chapters, the thesis deals with the reflexive solutions to deal with the communication between employment security and social security systems at international, regional and domestic levels (the latter using the case of Cyprus).

[224] Madsen (n.18), p.4.

Chapter 3: International labour and social security protection

3.1 Introduction

This Chapter consists of five main sections. The first section provides an overview of a range of UN entities for transnational labour regulation: the International Labour Organization (ILO) and the UN human rights bodies. The second section examines international labour standards and attempts to understand to what extent job security and employment security were conceived at international level. The analysis is focused on ILO Convention N.158 on Termination of Employment (1982) and the related UN human rights treaties, which promote non-discrimination in the world of work. The third section explores social security, as a constituent component of the right to non-discrimination in the UN human rights treaties. In addition, the chapter investigates ILO Convention N.102 and other specialized ILO instruments, which introduced minimum social security standards for transitional employment. It looks at maternity, unemployment, educational and health-related benefits, which could be used to facilitate transitions of workers in the labour market. Lastly, the fourth section is dedicated to the UN Sustainable Development Goals (SDGs) as soft-law mode of governance through which the actors seek to raise international labour standards.

The ILO is an international organization for transnational labour regulation. It is unique because of its tripartite structure, which means it brings together governments, employers' and workers' representatives (trade unions) in the decision-making process. The ILO, which was established in 1919, has become a UN specialized agency since 1946.[1] The ILO Constitution of 1919, which was signed in November 1919 as Part XIII of the Versailles Peace Treaty and became independent from the Peace Treaty in 1934, established three core propositions: a) social justice is the only means to bring peace, b) the ILO aims to regulate various aspects of work and social security, such as 'prevention of unemployment' and 'protection against sickness, disease and injury'; and c) the standard-setting of labour standards is a matter for the global community.[2]

[1] ILO, Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labour Organization, (Vol.XXIX, No.6, 20 December 1946) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/genericdocument/wcms_433792.pdf> accessed 17 February 2019.
[2] Constitution of the International Labour Organisation (1 April 1919).

James Shotwell, who was a delegate in the 1919 Peace Conference, wrote that the first proposition was just seen as 'a formula which would enable [the participants in the drafting process of the Peace Treaty] to tie [the] institution into the structure of that new world order which the League of Nations symbolized', which was the forerunner of the UN.[3] The UN Charter of 1945 sets as a core aim to 'maintain international peace and security', an aim that was also established as a core mandate of the League of Nations and enshrined in the Treaty of Versailles as Part I: 'The Covenant of the League of Nations'.[4] The first proposition of the ILO 1919 Constitution shows that industrial peace and international peace as conceived in the broader UN regime were inter-linked.[5] Carter Goodrich also argued that 'it [was] the UN that [provided] the greatest part of the [ILO's] membership, leadership and support'.[6]

Nevertheless, the ILO 1919 Constitution established the institutional basis for the adoption of international labour standards, which are embodied in ILO Conventions (hard-law) and Recommendations (soft-law). The Declaration of Philadelphia 1944, which was adopted in the 26th session of the usually annual International Labour Conference (ILC) and further integrated in the ILO Constitution, reshaped the aims of the ILO in the post-war era.[7] In the 1944 Declaration of Philadelphia, social justice and economic security were incorporated as two inter-linked fundamental aims of the ILO.[8]

The 1998 ILO Declaration for Fundamental Rights and Freedoms and its follow-up mechanism, which were adopted unanimously by the ILC (in its 86th session) on 18 June 1998, recognized four fundamental rights that include the elimination of discrimination in respect of employment and occupation.[9] According to the 1998 ILO Declaration, the obligation to respect, promote and realize these principles arise 'from the very fact of membership in the Organization', which means the Declaration has reaffirmed the values of the ILO.[10] Erica de Wett argued that the 1998 ILO Declaration reflected the concerns that emerged in the 1990s over the new economy of globalization.[11] The 'quest for more flexibility', which could have

[3] Langille B., 'Re-Reading the Preamble to the 1919 ILO Constitution in Light of Recent Data on FDI and Worker Rights' (2003) 42(1) *Columbia Journal of Transnational Law* 87, p.95.
[4] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, article 1(2); Treaty of Versailles (Paris Peace Conference, 28 June 1919) Part I, Preamble.
[5] Wet d. E., 'Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work' (2008) 9(11) *German Law Journal* 1429, p.1431.
[6] Goodrich C., 'International Labor Conference of 1944' (1944) 58 *Monthly Labor Review* 490, p.491.
[7] ILO Declaration of Philadelphia 1944 (26th ILC session 10 May 1944).
[8] Ibid.
[9] ILO Declaration on Fundamental Principles and Rights at Work (86th ILC session Geneva 18 June 1998).
[10] Ibid, para.18.
[11] Wet (n.5), p.1435.

led to a race to the bottom in labour standards, was reflected in the 1998 ILO Declaration.[12] To explain, the focus of the ILO 1998 Declaration is based on the four principles as integrated in the international labour standards, rather than on 'the detailed standards themselves'.[13]

The 2008 Declaration on Social Justice for a Fair Globalization, which reaffirmed ILO constitutional aims, was unanimously adopted to address the challenges in the new globalized economy. The challenges of globalization have been characterized by Francis Maupain as 'a threat to the ILO's *raison d'être*'.[14] In this context, the 2008 Declaration set the following four 'strategic objectives', which shall be 'inseparable, interrelated and mutually supportive': a) promotion of sustainable employment b) promotion of social protection, which includes social security protection c) respect of core fundamental rights and principles, which includes the principle of non-discrimination and d) promotion of social dialogue and tripartism.[15] The 2019 ILO Centenary Declaration for the Future of Work called upon the ILO Member States 'to develop its human-centred approach to the future of work', which could be achieved *inter alia* by 'strengthening the capacities of people' (e.g. through 'effective LLL' and social protection), 'strengthening the institutions of work to ensure adequate protection to all workers' (while respecting workers' fundamental rights) and 'promoting sustained, inclusive and sustainable economic growth, full employment and decent work for all'.[16]

The ILO has limited enforcement powers because its existing so-called supervisory mechanisms, such as the Committee of Experts on the Application of Conventions and Recommendations (CEACR), cannot force the Member States to comply with the ILO standards.[17] The ILO's enforcement deficits have been discussed among labour law scholars. For example, Maupain stated that the ILO standards 'lack of teeth', whereas Thomas Payne referred to 'weak enforcement powers of ILO'.[18]

The labour-related human rights approach can be found in the UDHR and the UN human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the UN Convention on the Elimination of All forms of Discrimination against Women

[12] Ibid.
[13] Ibid.
[14] Maupain F., 'New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization' (2009) 20(3) *EJIL* 823, pp.826-827.
[15] ILO Declaration 2008 on Social Justice for a Fair Globalization (97th ILC session Geneva 10 June 2008).
[16] ILO Centenary Declaration 2019 for the Future of Work (118th ILC session Geneva 21 June 2019).
[17] See examples of the CCAS Report at <https://www.ilo.org/global/standards/information-resources-and-publications/WCMS_190528/lang--en/index.htm> accessed 17 February 2019.
[18] Maupain (n.14), p.827; Payne T., 'Retooling the ILO: How a New Enforcement Wing Can Help the ILO Reach its Goal Through Regional Free Trade Agreements' (2017) 24(2) *Indiana Journal of Global Legal Studies* 597.

(CEDAW). The UN human rights treaties and supervisory bodies partly adopted 'compatibility clauses' to avoid collisions with the ILO labour standards.[19] For example, the UN General Comment N.18 (2006) on the right to work, which was produced by the CESCR, refers to ILO Convention N.158 to define the normative content of the valid reasons for dismissal and the relevant procedures (e.g. the right to redress for unlawful or unfair dismissals).[20] In addition, the UN CESCR General Comment N.19 on social security (2007) refers to the social security branches as set out in ILO Convention N.102 (e.g. unemployment and maternity leave), which shall be endorsed in the national social security systems.[21] The ILO and the UN human rights treaty bodies set international labour standards for all the relevant actors through hard-law and soft-law instruments, an argument that deviates from Maupain's opinion, according to which the ILO's normative operation is solely focused on traditional actors.[22]

As the third proposition of the ILO Constitution describes, the UN and the ILO as its specialized agency have also acquired a core mandate: to enhance the international cooperation for the full realization of the purposes of the UN. In the UN Charter 1945, international cooperation is understood as a way to resolve *inter alia* socio-economic problems, promote human rights and tackle inequalities.[23] The UN Resolution 23/3 of 2013, which was adopted by the UN Human Rights Council (HRC), reaffirms the importance of multi-level cooperation among different actors, including States, specialized agencies and intergovernmental organizations.[24] In this context, the ILO does not aspire 'to solve a global, rationally-created dilemma', but helps States to develop their own regulations, which would correspond to the domestic realities and avoid the race to the bottom in labour standards.[25] Brian Langille has also discussed the 'spill-over effects' of national laws and policies, which can create obstacles for transitions experienced by workers in an era of globalization.[26]

The ILO's cooperation with other international organizations is based on articles 12(1) and 12(2) of the ILO 1919 Constitution. The ILO works in collaboration with the CoE and the EU,

[19] Saiko H., 'International Labour Organization (ILO)' <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e490> accessed 14 January 2019.
[20] UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment N.18' (6 February 2006) UN Doc E/C.12/GC/18, p.4.
[21] UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment N.19' (4 February 2008) UN Doc E/C.12/GC/19, p.4, para. 12.
[22] Maupain (n.14); Charnovitz S., 'Reinventing the ILO' (2015) 154(1) *International Labour Review* 91, p.55.
[23] UN Charter, article 1(3).
[24] UNGA Res 23/3 (21 June 2013) UN Doc A/HRC/RES/23/3.
[25] Langille (n.3), p.89.
[26] Ibid.

which are the two regional (European) systems that are examined in this research project. The ILO signed its cooperation agreement with the CoE in 1952, which describes the nature of their relationship.[27] First, the Committee of Ministers of the CoE may propose items that will be discussed in the agenda of the ILO. Second, the CoE and the ILO shall consult each other on topics that are related to their broader aims and exchange information and documents. Third, the CoE may request from the ILO to provide its technical assistance on matters that fall within the scope of the ILO's expertise. In this context, the European Social Charter (ESC) sets the obligation of the CoE to invite representatives from the ILO to participate as consultants in the deliberations of the Committee of Experts.[28] In addition, the European Code of Social Security (ECSS), whose core text is based on ILO Convention N.102, obliges the Secretary General to send a report and request from the International Labour Office to consult the appropriate ILO body on the matter that arose in the said report.[29]

The ILO also signed an agreement for mutual consultation and cooperation with the EU. These two organizations, despite their different historical origins, share mutual aims. Their cooperation dates from 1953 when the ILO signed an agreement with the European Coal and Steel Community, which set the origins of the EU's institutions as known today, to 'develop employment and improve standard of living'.[30] In 1958, the ILO concluded an arrangement with the EU, according to which ILO's representatives could be invited as consultants in the so-called 'Social Committee of the Western European Union'.[31] The ILO Director-General and the EU Commissioner on Employment and Social Affairs renewed their cooperation after a formal exchange of letters in 2001 and agreed to hold annual high-level meetings.[32] In the 14th High-level Meeting between the ILO and the EC (11-12 October 2018, Brussels) discussed, among other issues, the European Pillar of Social Rights and the Future of Work

[27] ILO Official Bulletin (Vol.XXXV, N.1, 20 June 1952), Agreement between ILO and Council of Europe <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/genericdocument/wcms_440247.pdf> accessed 17 February 2019.
[28] ESC, article 26.
[29] European Code of Social Security (ECSS) (16 April 1948) ETS 48, article 74(4).
[30] ILO Official Bulletin (Vol.XXXVI N.1, 1 June 1953), Agreement concerning Co-operation between the International Labour Organisation and the European Coal and Steel Community <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/genericdocument/wcms_440253.pdf> accessed 17 February 2019.
[31] ILO Bulletin (Vol.XLI N.1, 1958) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/genericdocument/wcms_440269.pdf> accessed 17 February 2019.
[32] Exchange of letters between the Commission of the European Communities and the International Labour Organization [2001] OJ C165/23.

Initiative.[33] According to the Standing Orders of the ILC, the EU is also entitled to participate (without vote) in the ILC discussions (plenary and technical committees).[34] The EU plays a key role in the adoption of multiple ILO Conventions and Recommendations, such as ILO Recommendation N.200 (HIV/AIDS) and ILO Recommendation N.202 of 2010 (Social Protection Floors). For example, the Government Member of Denmark, as representative of the EU, stated *inter alia* that ILO Recommendation N.202 respects fundamental EU values and expressed the concern that the 'floors should not act as ceiling' for social protection.[35] According to the Orders of the ILO Governing Body (section 1.9.1), the EU as a public international organization, which is represented by the European External Action Service (EEAS) and other officials, also participates in the Governing Body.[36] In addition, the ILO and the EU share the same development plan (SDGs 2030). In the 2017 Joint Statement 'The New European Consensus on Development', the EU agreed to implement the SDGs in their internal and external policies for eradication of poverty and sustainable development, which will constitute the EU global strategy.[37]

3.2 Job security, employment security and equality

3.2.1 Introduction

The shift from unemployment prevention to the promotion of full employment is reflected in the constitutional aims of the ILO. The Preamble to the 1919 ILO Constitution sets 'prevention of unemployment' as a foundational aim of the Organization to promote 'peace, social justice and harmony of the world'.[38] In the first session of ILC, the General Conference of the ILO adopted the Unemployment Convention (N.2) to establish free public employment agencies

[33] See more details about the 14th High-Level Political Forum, <https://ec.europa.eu/social/main.jsp?langId=en&catId=85&eventsId=1355&furtherEvents=yes#navItem-praticalInformation> accessed 17 February 2019.
[34] Standing orders of the ILC, article 14(9).
[35] ILC, 101st session, May-June 2012, Fourth item on the agenda: Elaboration of an autonomous Recommendation on the protection floor, <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_182950.pdf> accessed 17 February 2019, p.5 para.19.
[36] Council Decision 2010/427 establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30.
[37] EU, Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, 'The new European consensus on Development: Our world, our dignity, our future' <https://ec.europa.eu/europeaid/sites/devco/files/european-consensus-on-development-final-20170626_en.pdf> accessed 17 February 2019.
[38] ILO Constitution, Preamble.

under the governmental authority and prevent unemployment.[39] In the 1944 ILO Declaration, there are added two core propositions: a) the 'promotion of full employment and raising of standards of living' and b) the promotion of 'economic security and well-being development for all human beings irrespective of race, creed or sex'.[40]

The term 'economic security' is comprised of different types of security, which include 'job security', 'employment security' and 'labour market security'. These different types of security, which are explained in the 2004 ILO Socio-security Report, were previously discussed in chapter 2.[41] Just to briefly remind: 'job security' appears as securing a particular job, 'employment security' means to find a job adjusted to the worker's skills and 'labour market security' and refers to employability.[42] The list of the three non-valid grounds for non-discrimination ('race, creed and sex') was further extended in the 1998 ILO Declaration, which recognized the principle of equality and non-discrimination as one of the core fundamental aims of the ILO.[43] In addition, the 2008 ILO Declaration reinforced the shift in the ILO's mandate from tackling unemployment to the promotion of productive and full employment and decent work for all.[44]

The International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrines the right to gainful employment (article 6), the right to fair and equal treatment in employment (article 7) and the right to decent living of workers and their families (article 7). The ICESCR was adopted on 16th of December 1966 by the UN General Assembly (UNGA).[45] In the early stages of the drafting process of the two Covenants, the UN Commission on Human Rights did not want to include social, economic and cultural rights.[46] The UNGA, which overturned the UN Commission on Human Rights' decision, stated: 'when deprived of economic, social and cultural rights, man does not represent the human person whom the [UDHR] regards as the

[39] ILO Convention N.2: Convention concerning Unemployment (1st ILC session Washington 28 November 1919).
[40] ILO Constitution, Annex.
[41] ILO Socio-economic Programme, 'Definitions: What we mean when we say "economic security"' (ILO, September 2014), <http://www.ilo.org/public/english/protection/ses/download/docs/definition.pdf> accessed 14 January 2019.
[42] Ibid.
[43] ILO Declaration on Fundamental Principles and Rights at Work (86th ILC session Geneva 18 June 1998) (ILO Declaration 1998), article 2(2).
[44] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), p.3.
[45] Ibid.
[46] Baderin M. and McCorquodale R., *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007), p.10.

ideal of the free man'.[47] Mashood Baderin argued that social, economic and cultural rights, which are characterized as 'second-generation rights', are not 'second-class rights to civil and political rights'.[48] The ICESCR was therefore adopted alongside the International Covenant on Civil and Political Rights in 1966 and has been ratified by most of the UN Member States (169 out of 197 UN States),[49] which shows the strong desire of the international community to protect, respect and fulfil the so-called 'rights of the second generation'.[50] In the Vienna World Conference on Human Rights (1993), the participants reminded the international community that 'all human rights are universal, indivisible, interdependent and interrelated', a maxim that was initially stated in the Preamble of the ICESCR.[51] After the Vienna World Conference, the number of ratifications was significantly increased.[52]

The Committee on Economic, Social and Cultural Rights (CESCR), which is the supervisory Committee of the ICESCR, was founded in 1987 by the United Nations Economic and Social Council (ECOSOC) Resolution 1978/10.[53] The CESCR has two main monitoring functions: a) the Concluding Observations, through which the Committee outlines its concerns and makes suggestions and recommendations for the implementation of the Covenant, and b) the General Comments, which reports on the current reporting procedures and the rights, and reflect on general issues that the UN Member States, the specialized agencies (including the ILO) and other stakeholders, for the full realization of the rights, which are enshrined in the ICESCR. The ILO CEACR facilitates the inter-state communication between the Government and the UN Committee, although the two supervisory mechanisms are at least in theory distinct. In addition, the Optional Protocol to ICESCR (OP-ICESCR), which entered into force in May 2013, also recognized the competence of the CESCR to examine individual or inter-state communications.[54]

[47] Ibid, p.6.
[48] Ibid.
[49] ICESCR ratified by Cyprus on 2 April 1969 (Law N.14/1969).
[50] Baderin and McCorquodale (n.46), p.6.
[51] Ibid.
[52] Ibid.
[53] United Nations Economic and Social Council (ECOSOC), Resolution 1988 (LX) of 11 May 1976, decision 1978/10 of 3 May 1978.
[54] UNGA Res 63/117 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (5 March 2008) A/RES/63/117 (OP-ICESCR).

3.2.2 ILO Convention N.158 concerning Termination of Employment

ILO Convention N.158, which was adopted by the ILC on its 68th session (1982), regulates specific aspects of individual and collective dismissal procedures to ensure job security and employment security for workers, including *inter alia*: the scope of protection, valid and non-valid reasons for dismissals, notice period, prohibition for constructive dismissals, severance pay and consultations of workers' representatives. According to the Preamble to the Convention N.158, the ILC adopted ILO Convention N.158 because of the implications of economic systems and technological advancements on employment protection. According to Rogowski, ILO Convention N.158 inspired the development of dismissals laws across the globe.[55] This argument is reinforced by the case of Cypriot Law 24/67, which will be analysed further in chapter 6 (case study of Cyprus), which integrated the minimum labour standards of ILO Convention N.158.

ILO Convention N.158 integrated the principle of universality and laid out a clear-cut statement: these rules are applicable to all workers in all economic activities.[56] In article 2(b) of ILO Convention N.158, the States are eligible to exclude the following categories of workers: a) temporary, periodical or fixed-term workers b) workers under probation c) casual workers d) workers, who are employed 'under special arrangements', and e) workers, who are facing 'special problems of a substantial nature' in terms of their employment conditions, the size or nature of the undertaking that employs them'.[57] It seems that ILO Convention N.158 created double standards because workers, who fall in categories (d) and (e) could only be excluded with prior consultations with workers and employers.[58] In the 2016 Research Paper for the International Labour Office, it is evident that States have exempted many categories of workers from the scope of application (e.g. domestic workers, agricultural workers and seafarers).[59] For example, the Cypriot legal system does not include public (and semi-public) workers, police officers and army under the scope of ILO Convention N.158.[60]

The CEACR requested from the Governments of Ethiopia (2000) and Latvia (2001) to provide further information about the domestic law on the prior consultations for workers that fall in

[55] Rogowski R., *Reflexive labour law in the world of society* (Edward Elgar Publishing Limited 2013), p.95.
[56] ILO Convention N.158: Convention concerning Termination of Employment at the Initiative of the Employer (68th ILC session Geneva 22 June 1982) (ILO Convention N.158), article 2(a).
[57] ILO Convention N.158, article 2.
[58] Ibid.
[59] See online:<https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_516125.pdf> accessed 14 January 2019, pp.3-4.
[60] Ibid.

categories (d) and (e), but did not issue any 'General Observation' or 'Direct Request' about consultations for workers that fall in the categories (a), (b) and (c).[61] This seems to be a normative gap, which can create divergence of job security standards between standard and non-standard forms of employment.

The valid reasons for termination of employment under ILO Convention N.158 are related to the performance, conduct of employee or the so-called 'operational requirements of the undertaking, establishment or service' that are conceived in the ILO context as reasons of 'economic, technological, structural or similar nature'.[62] For economic dismissals, there are specific procedures that need to be followed: firstly, consultations with workers and employers' representatives and secondly, send a notification to the competent authority.[63] For example, economic reasons, which might slowdown business activities or lead to organizational changes at enterprise-level, cannot exclude workers from the scope of protection and justify worker's dismissal without following the two procedures. In case of constructive dismissals, which means change of working conditions by the employer forcing him to resign (such as increase of working hours or working tasks or reduction in wages), the burden of proof rests on the employer.[64]

Full-time workers, whose employer temporarily reduced their normal working hours due to economic, technological or structural factors (a phenomenon known as 'partial unemployment'), are not considered as part-time workers.[65] This has implications for application of the ILO Convention on Part-time workers (N.175), which established that part-time workers and their 'comparable full-time workers' are entitled to equivalent protection in terms of *inter alia*: termination of employment, sick-leave, maternity protection, paid annual leave and discrimination in occupation and employment.[66] For example, Member States may adopt legislative measures for social security protection, e.g. educational benefits for on-job training for full-time employees, which means part-time workers would be excluded from the training scheme. 'Comparable full-time workers' means workers that have the same

[61] CEACR Direct Request on ILO Convention N.158, Ethiopia (adopted 2000, published 89th ILC session 2001).
[62] ILO Convention N.158, articles 4 and 13.
[63] ILO Convention N.158, article 13.
[64] ILO Convention N.158, article 9(2).
[65] ILO Convention N.175: Convention concerning Part-Time Work (81st ILC session Geneva 24 June 1994), article 1(d).
[66] ILO Convention N.175, article 7.

employment relationship, or they are engaged in the same or similar type of activity or employed in the same undertakings (i.e. establishment/enterprise/branch).[67]

3.2.3 Equality, employment security and unfair dismissals

ILO Convention N.158 sets out a comprehensive list of invalid reasons for dismissals, which is further extended by the ILO Recommendation N.166 that guides the application of the Convention. The list, which is set in ILO Convention N.158, consists invalid reasons for dismissals that are related to specific workers' rights: the right to organize and collective bargaining, the right to appeal against unfair or unlawful dismissal and the right to non-discrimination. The prohibited grounds of discrimination for unfair dismissals are: race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.[68] The same grounds were also enshrined in ILO Convention N.111 of 1958 that prohibits discrimination in respect of employment and occupation, which includes access to employment, employment terms and conditions and access to vocational training.[69] ILO Convention N.111 is one of the eight fundamental ILO Conventions, which were identified by the ILO's Government Body.[70]

The Preamble of ILO Convention N.111 refers to the principle of equality as established in the UDHR, which illustrates the convergence of the international regulatory systems (ILO and UN) to address inequality as a wider societal goal.[71] The UDHR, which was adopted as a (soft-law) Resolution of the UNGA,[72] set the principles of equality and freedom from discrimination as its main themes. Marking fifty-years from the adoption of UDHR, Kofi Annan, who was Secretary General of the UN, stated: 'Human rights belong not to a chosen few, but to all people'.[73] ILO Convention N.111 sets forth the rules for promotion of equality to ensure transitions in the labour market. Whereas, ILO Convention N.158 sets job security rules, which could either facilitate the transitions in the labour market or create rigidities and obstacles for such transitions, which are needed to facilitate the transitions in the labour market.

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[67] ILO Convention N.175, article 1
[68] ILO Convention N.158, article 5.
[69] ILO Convention N.111: Convention concerning Discrimination in Respect of Employment and Occupation (42nd ILC session Geneva 25 June 1958), article 1.
[70] See the link <https://www.ilo.org/public/english/standards/relm/gb/docs/gb273/lils-7.htm> accessed 17 February 2019.
[71] ILO Convention N.111, Preamble.
[72] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).
[73] Annan K., 'Foreword' in Dias C.J., Stamatopoulou, E., and Danieli, Y. (eds) *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Baywood Publishing Company 1999).

The ICESCR and the labour-related UN human rights treaties enshrined similar prohibited grounds for dismissals in ILO Conventions N.111 and N.158. This section deals with the different grounds for discrimination in the context of employment security and job security.

Sex and sexual orientation

ILO Conventions N.111 and N.158, as well as the ICESCR, recognize 'sex' as a prohibited ground. In addition, the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which was adopted on 18 December 1979, set out specific measures that the State shall take and prevent discrimination.[74] Article 11(1) of CEDAW enshrines that female workers shall have the same employment opportunities and entitles their right to promotion of employment and the right to job security. In addition, article 6 of the UN Convention on the Rights of People with Disabilities (CRPD) also enshrines the right of female workers with disabilities to non-discrimination.[75] According to the 2018 Report of the ILO Director General, it appears that there are obstacles for female workers in the science, technology, engineering and mathematics (STEM) disciplines, who struggle to enter 'male-dominated fields'.[76]

Sexual orientation is not included in the list of prohibited grounds in ILO Conventions N.111 and N.158, which shows that there is a normative gap at the international level. Sexual orientation is only prohibited in the context of ILO Recommendation N.200 (People with HIV/AIDS) and ILO Convention N.188 (Private Employment Agencies).[77] The 2011 Global Report, as the follow-up report to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, referred to sexual orientation as a discriminatory ground.[78] By way of contrast, the EU Directive 2000/78, which promotes non-discrimination in employment and occupation, explicitly prohibits discrimination on the grounds of sexual orientation.[79] The reason for this

[74] UN Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) 1249 UNTS 13 (CEDAW).
[75] UNGA Res 61/106 Convention on the Rights of People with Disabilities (24 January 2007) A/RES/61/106.
[76] ILC, 107th session, 2018, Report I(B) of the Director General, 'The Women at work initiative: the push for equality', <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_629239.pdf> accessed 17 February 2019, p.2.
[77] ILO, Governing Body, 319th session, October 2013, 'Discrimination at work on the basis of sexual orientation and gender identity: Results of a pilot search' <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_221728.pdf> accessed 17 February 2019.
[78] ILO, Report of the Director-General, 100th session, 2011, Report I(B)'Discrimination at work <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_166583.pdf> accessed 6 March 2019, p.51.
[79] EU Directive 2000/78, article 1.

divergence between the EU and the ILO could be that there are still some non-EU countries, such as Saudi Arabia, Sudan and Yemen, which still criminalize same-sex relationships.[80]

Maternity leave

The reasons related to maternity leave are solely recognized in the ILO Conventions N.158 and 183 as invalid reasons for discrimination. ILO Convention N.183 of 2000 replaced one of the first ILO Conventions (i.e. ILO Convention on Maternity Leave N.3) and raised the labour standards for maternity protection.[81] The scope of protection includes all workers, including atypical workers, whereas, ILO Convention N.158, as explained above, enables States to exclude some categories of workers. In addition, the term 'child', in contrast to EU Directive 92/85, does not describe whether it means a biological or adopted child and the term 'woman' refers to all female workers, without specifying whether it means biological, adoptive or surrogate mother. ILO Convention N.183, which seems to reflect EU Directive 92/85, provides the right of female workers to return to work after maternity leave, which shows notion of internal flexibility to ensure employment security. In article 11(2) of CEDAW, States are also obliged to ensure that female workers are not prevented from exercising their right to work for reasons related to maternity leave.

Family responsibilities

'Family responsibilities' are also recognized as a prohibited ground against discrimination in the ILO Conventions N.111 (as part of non-discrimination), N.156 and N.158 (as non-valid reason for dismissal). According to article 4 of ILO Convention N.156 of 1981 for Workers with Family Responsibilities, individuals with family responsibilities are entitled to the right to free choice of employment and the right to enjoy the same protection with other workers regarding the employment terms and conditions.[82] 'Workers with family responsibilities' refer to 'men and women with responsibilities in relation to their dependent children, or other members of their immediate family that clearly need their care and support'.[83] ILO Convention N.156 integrated the concept of transitional employment. The national measures shall provide

[80] UN for LGBT Equality, Free & Equal, Fact Sheet: Criminalization, <https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf> accessed 17 February 2019.
[81] ILO Convention N.3: Convention concerning the Employment of Women before and after Childbirth (1st ILC session Washington 29 November 1919); ILO Convention N.183: Convention concerning the revision of the Maternity Protection Convention (Revised) (88th ILC session Geneva 15 June 2000).
[82] ILO Convention N.156: Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (67th ILC session Geneva 23 June 1981), article 4.
[83] Ibid, article 1.

employment security and enable the workers with family responsibilities to enter, remain or re-enter in the labour market.[84]

Race and nationality

'Race', as an invalid ground for discrimination, was enshrined in the 1944 ILO Declaration, which was further integrated in ILO Conventions N.111 and N.158. The UN Convention on the Elimination of All Forms of Racial Discrimination (CERD), which prohibits direct or indirect discrimination on grounds related to race, also enshrined *inter alia* the right to work, the right to free choice of employment and the right to be protected against unemployment, which refers to employment security.[85] In regards to 'nationality', the ICESCR refers to 'national or social origin', whereas ILO Conventions N.111 and N.158 prohibit discrimination on grounds of 'national extraction'.[86]

Disability

'Disability' is not included in the lists of prohibited grounds for discrimination under ILO Conventions N.158 and N.111. Nevertheless, in cases of temporary absence of work due to injury or disease, ILO Convention N.158 provides that States are eligible to set specific limitations (for example, request for a medical certification).[87] The UN Convention on the Rights of People with Disabilities (CRPD), which was adopted by the UNGA on 13th December 2006, enshrines the right of workers with disabilities to work.[88] It is the first UN instrument that was ratified by the EU, which can explain why the EU Directive 2000/78 also included the ground of disability in the prohibited grounds against discrimination in occupation and employment. The CRPD sets out the obligation of the States to prohibit discrimination against workers with disabilities in relation to 'conditions of recruitment, hiring and employment, continuance of employment [and] career advancement'.[89] In other words, the CRPD, like the other UN treaties for protection of vulnerable workers, aim to facilitate the transition of workers with disabilities in the labour market (i.e. foster employment security), while promoting the principle of non-discrimination.

[84] ILO Convention N.156, article 7.
[85] International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 UNTS 195 (CERD), article 5.
[86] ICESCR, article 2.
[87] ILO Convention N.158, article 6.
[88] CRPD, article 27.
[89] Ibid.

HIV/AIDS status

ILO Recommendation N.200 (2010) particularly covers people with HIV/AIDS under the protection of ILO Convention N.111, according to which real or perceived HIV/AIDS shall not constitute a valid reason for discrimination in occupation and employment.[90] The States shall adopt the appropriate measures to support people with HIV/AIDS and help them remain, enter or re-enter the labour market. In the EU context, HIV/AIDS status has not explicitly been accepted as invalid reason for discrimination, however, it could fall under the scope of 'disability' of EU Directive 2000/78. The fact that there is no clear definition of 'disability' in the UN CRPD, which was also signed by the EU, could create implications. As Peter McTigue observed, there are two models of defining 'disability': the medical model and the social model.[91] The medical model conceives disability as 'a medical condition,' whereas, the social model adopts a broader meaning of the term, according to which disability refers to 'any societal factor that imposes restrictions on disabled people'.[92] The 2018 GNP+ study, which was supported by the ILO, shows that people living with HIV/AIDS are stigmatized and often excluded from the labour market.[93] In Greece, 80% of people with HIV were dismissed or lost an employment opportunity because of HIV status.[94] Infection with HIV does not necessarily affect the functionality of the individual, which means HIV status fits into the social model of disability, as McTigue explained.[95]

Age

The ground of 'age discrimination' was also added in the list of non-valid grounds for dismissal by ILO Recommendation N.166, which as soft-law instrument leaves the discretion to the States to include or exclude it in the domestic legislation.[96] Whereas, in ILO Convention N.111 and ICESCR, the ground of age is potentially included in the open-clause of 'other status'.[97] The ILO Recommendation on Older Workers (N.162), which identified the normative gap of

[90] ILO Recommendation N.200: Recommendation concerning HIV and AIDS and the World of Work (99th ILC session Geneva 17 June 2010).
[91] McTigue P., 'From Navas to Kaltoft: The European Court of Justice's evolving definition of disability and the implications for HIV-positive individuals' (2015) 15(4) *International Journal of Discrimination and the Law* 241, p.243.
[92] Ibid.
[93] ILO and GNP+, 'HIV Stigma and Discrimination in the World of Work: Findings from the People Living with HIV Stigma Index', (June 2018) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_635293.pdf> accessed 17 February 2019.
[94] Ibid, p.15.
[95] McTigue (n.91).
[96] ILO Recommendation N.166: Recommendation concerning Termination of Employment at the Initiative of the Employer (68th ILC session Geneva 22 June 1982).
[97] ILO Convention N.111, article 1(b); ICESCR, article 2(2).

ILO Convention N.158 regarding age, sets out that older workers shall have equal protection with other workers in terms of 'employment security'.[98] The use of 'employment security' to describe dismissal laws rather than swift transitions in the labour market shows that at the time when the Recommendation was adopted 'employment security' seems to be identical to 'job security'. To explain, article 5(c) of ILO Recommendation N.162 refers to employment security and further states that this is 'subject to national law and practice relating to termination of employment', which refers to dismissal laws.[99]

The non-inclusion of 'age' in the invalid grounds for dismissals of ILO Convention N.158 illustrates two core issues. First, there is a normative gap in the international regime, which could leave young or older workers exposed to the risk of unemployment and poverty. In the 2017 UN Report, the statistics indicate that the world is ageing. For example, the people in Europe, of sixty years old or over, will be increased from 25 to 35 percent in 2050.[100] It seems that it is time to fill this normative gap, which will be intensified in the following years due to demographic changes, and adopt a new approach for creating an inclusive labour market. In addition, young workers in many countries (such as Cyprus, Spain and Greece) are also facing a continuing challenge with unemployment.[101] Secondly, this normative gap reflects the divergence between the ILO/UN systems and the EU, which prohibits dismissals for reasons related to age. The EUCFR and the Framework Directive 2000/78 prohibit discrimination on grounds related to age in terms of employment and occupation.[102]

3.3 Social security regulation

3.3.1 Introduction

Social security is an integral part of the modern societies, which emerged in the late nineteenth century in Europe to provide income security and maintain the quality of people in response to social risks. The term 'social risk', which is known as 'contingency' in the ILO context, is

[98] ILO Recommendation N.162: Recommendation concerning Older Workers (66th ILC session Geneva 23 June 1980).
[99] Ibid, article 5(c).
[100] UN World Population Prospects <https://esa.un.org/unpd/wpp/Publications/Files/WPP2017_KeyFindings.pdf> accessed 14 January 2019.
[101] Eurostat official website, <https://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics#Youth_unemployment> accessed 14 January 2019.
[102] EUCFR, article 21; Directive 2000/78, article 1.

described by Patrina Paparrigopoulou as 'a future and uncertain event, which is against the will of the person, that causes damages and creates needs'.[103] When the ILO was established in 1919, social security was set in its preamble where the realization of social justice in the global community was linked to the regulation for protection of workers against specific social risks: unemployment, sickness, old-age, disease and injury arising out of employment.[104]

In the 1944 ILO Declaration, the reshaped fundamental aims established a maxim: 'poverty anywhere constitutes a danger to prosperity everywhere'.[105] In this context, it further referred to 'the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care'.[106] The 1944 Declaration's approach towards a universal social security scheme, which aims to alleviate poverty, prevent inequalities and tackle social exclusion, integrates the core features of Beveridge Plan. The Beveridge Plan for Social Security was adopted in the UK after the end of World War II (1946), which included the National Health Service for free medical treatment for all.[107] The Beveridge Report was adopted to 'address "five giant evils": want, disease, ignorance, squalor and idleness'.[108] The ILO 2008 Declaration for Social Justice and Globalization, which introduced the Decent Work Agenda, introduced 'the idea of dynamic and positive social security protection'.[109] It further stated the need to adjust the social security protection on 'the new needs and uncertainties generated by the rapidity of technological, societal, demographic and economic changes'.[110] This approach reflects the capacity of autopoietic systems to be cognitively open and address societal problems through their internal procedures. In an era of 'transformative change in the world of work', the 2019 ILO Centenary Declaration calls upon the Member States to provide 'universal access to comprehensive and sustainable social protection' and 'support people through the transitions they will face throughout their working lives'.[111]

The right to social security is enshrined as part of socio-economic rights and non-discrimination. The UDHR declares the universality of the right to social security and interlinks it to the realization of human dignity and 'free development of [his] personality'.[112]

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[103] Paparrigopoulou P., *Social Insurance Law* (2nd edn, Nomiki Vivliothiki 2016), p.17.
[104] Constitution of the International Labour Organization (1919), Preamble.
[105] ILO Declaration 1944.
[106] Ibid, Annex, Part (III(f)).
[107] BBC official website, <http://www.bbc.co.uk/history/historic_figures/beveridge_william.shtml> accessed 14 January 2019.
[108] Ibid.
[109] Giddens A., *Europe in the Global Age* (Polity Press 2007), p.96; Maupain (n.14), p.834.
[110] ILO Declaration 2008.
[111] ILO Centenary Declaration 2019 for the Future of Work, Parts I and III.
[112] UDHR, article 22.

In addition, the ICESCR, which also enshrines the right to social security, states that social insurance is included in the wider scope of social security protection.[113] There are also other UN treaties, which provide the right to social security for vulnerable groups of workers. The CEDAW prohibits discrimination against women and enshrines the following social-security related rights: the right to vocational education and training (article 11(c) CEDAW), the right to social security, which includes income security for unemployment, sickness, invalidity other incapacity to work and the right to paid-leave (article 11(1) CEDAW) and the right to maternity leave and benefit (article 11(2) CEDAW). The CRPD prohibits discrimination for people with disabilities and particularly provides: the right to social security and adequate standard of living (article 28 CRPD), the right to vocational training and education (article 27 (1)(k) CRPD) and the right to health care and health insurance (article 25 CRPD). The CERD enshrines that all workers, irrespective of their race, are entitled to the right to social security, medical care, public health and the right to education and training (article 5 CERD). In addition to this, ILO Convention for Workers with Family Responsibilities (N.156) enshrines the right of workers with family responsibilities to social security (article 4(b) ILO Convention N.156).

ILO Convention on Social Security (Minimum Standards) (N.102) of 1952, is a landmark ILO instrument, which was also inspired by the Beveridge Plan, and introduced minimum standards for social security protection. In the period of 1929-1934, the ILC concluded various bilateral agreements to regulate compensations for employment injuries, sickness, old-age and unemployment.[114] After the conclusion of Atlantic Charter (1941), the ILC in its 26th session adopted the ILO Recommendation on Income Security of 1944 (N.67), which set out the different branches of social security.[115] This seems an effort, which was adopted by the ILC to recognise the specific contingencies of social security for the first time, rather than introducing detailed standards.[116]

The dynamic role of the ILO for social security regulation is illustrated in the adoption of multiple Conventions (26) and Recommendations (22) of the ILO. The specialized ILO Conventions (for example, ILO Convention N.130 on sickness and medical benefit of 1969) raise the social security standards from 'the principal legal instrument', ILO Convention N.102.

[113] ICESCR, article 9.
[114] See <http://boletin.ciess.org/boletines/2015/12/pdf/social-security-minimum-standards.pdf> accessed 10 January 2019, p.2.
[115] ILO Recommendation N.67: Recommendation concerning Income Security (26th ILC session Philadelphia 12 May 1944), Preamble.
[116] ILO Recommendation N.67, article 7.

ILO Convention N.102 sets the following branches of social security, which address particular 'contingencies' (also known as social risks): medical care, sickness, unemployment, old-age, employment injury, maternity, invalidity and survivors' benefit.

Each State has developed its own model for social security protection. According to the ILO Report 2010/2011, 'social security takes a range of forms and is provided as social transfers from one group in society to another group in cash or in some other way (e.g. goods or services)'.[117] In other words, national social security system is functionally closed because of the complicated way that it operates - e.g. tax on income and income source. ILO Convention N.102 introduced a two-tier protection, which sets priorities that seem to correspond to the foundational aims of 1919 ILO Constitution, as explained in the Preamble (i.e. unemployment, sickness, disease and injury arising out of his employment, old age and injury'). ILO Convention N.102, which has been ratified only by 55 ILO Member States out of 187, requests from the States to: a) comply with at least three branches in total, b) the one branch shall be selected from the following branches: unemployment, old-age, employment injury, invalidity and/or survivors' benefits.[118] For example, Greece, which ratified Convention N.102 (1955), selected medical care (Parts II), sickness (Part III) and unemployment (Part IV), maternity (Part VIII), invalidity (IX) and survivor's benefit (X). Whereas, Cyprus selected the branches of sickness (Part III), unemployment (Part IV), V, VI, IX and X.[119] This two-tier protection could be translated as the ILO's efforts to convince States to comply with some of the minimum standards. The rest of this section is focused on the different branches of social security.

3.3.2 Maternity Benefit

The ILO transnational labour regulation for maternity benefit integrates the idea of transitional employment. ILO Convention N.102, which established that maternity benefit shall be provided during 'pregnancy, confinement and their consequences',[120] provides that maternity medical benefit should enable the woman to 'maintain, restore or improve her health status and her ability to work' and to cover her personal needs.[121] Whereas, ILO Convention N.183 of

[117] ILC, 100th session, Report VI: Social security for social justice and a fair globalization <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/-relconf/documents/meetingdocument/wcms_152819.pdf> accessed 17 February 2019.
[118] ILO Convention N.102: Convention concerning Minimum Standards of Social Security (35th ILC session Geneva 28 June 1952), article 2(a)(ii).
[119] ILO official website <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300 _INSTRUMENT_ID:312247> accessed 14 January 2019.
[120] ILO Convention N.102, articles 47 and 49.
[121] ILO Convention N.102, article 49(3).

2000 prescribes that benefits shall ensure that the woman can 'maintain herself in adequate health conditions and a suitable standard of living', however, the period of maternity leave shall not be less than six weeks.[122] Regarding the scope of application, ILO Convention N.183 is applicable to 'all employed women', a definition which also includes atypical forms of employment.[123] On the contrary, ILO Convention N.102 provides that maternity benefit is granted to women depending on their class.[124] Article 48 of ILO Convention N.102 prescribes that Member States should cover in the scope of protection all women in prescribed classes (that are set out in the Annex of ILO Convention N.102), which classes constitute not less than 50 per cent of all employees or not less than 20 per cent of all residents.

Nevertheless, the family and maternity benefits serve distinct aims, which sometimes can overlap. The family benefit refers to the cash benefit that is provided to 'maintain the children' whereas, the maternity benefit is paid to 'maintain the mother of the children and her child'.[125] The CEACR emphasized the strict bond between the mother and maternity benefit in the 2011 'Direct Request' to Latvia,[126] when stressing that the maternity benefit shall be provided to the mother even in cases where the child has died so that the mother will be able to receive the medical care and return to work.[127] It further reiterated that the maternity benefit belongs to the mother and aims to restore or improve her health status.[128]

ILO Conventions N.102 and N.183 also differ as to the connection between maternity benefits and employment security. ILO Convention N.102 provides that maternity benefit shall be provided to ensure that the female worker will be able to work.[129] Whereas, ILO Convention N.183, which seems to adopt the same regulatory framework with EU Directive 92/85,[130] provides that: a) the female worker has the right to return to work to the same or equivalent position with the same rate of pay;[131] b) the burden of proof that the reasons are unrelated to pregnancy, maternity or consequences from nursing rests on the employer; [132] and c) prohibits any discrimination against working mothers or pregnant workers with regard to access to

[122] ILO Convention N.183, article 6(2); the period could be reduced after the mutual agreement between the government and the representative organizations of employers and workers.
[123] ILO Convention N.183, article 2(1).
[124] ILO Convention N.102, article 48 and annex. The classification of workers is determined on the basis of the International Standard Industrial Classification of all Economic Activities.
[125] ILO Convention N.183, article 6(2); ILO Convention N.102, article 40.
[126] CEACR Direct Request on ILO Convention N.183, Latvia (adopted 2011, published 101st ILC session 2012).
[127] Ibid.
[128] Ibid.
[129] ILO Convention N.102, article 49.
[130] EU Directive 92/85, article 5(1).
[131] ILO Convention N.183, article 8.
[132] Ibid.

employment.[133] ILO Recommendation N.191, which facilitates the implementation of ILO Convention N.183, also endorses the right to paternity leave in cases where the mother is sick/hospitalised or died, however, it does not provide for the right of working fathers to return to work.[134]

3.3.3 Unemployment benefit

The preamble to ILO Convention N.168 of 1988 states that the level of social security protection concerning unemployment benefit as enshrined in ILO Convention N.102, which aims to eradicate poverty, has been surpassed by the most developed countries.[135] ILO Convention N.102 merely sets out the core principles of unemployment benefit, but ILO Convention N.168 goes a step further and recognizes that social security systems are of great significance for involuntarily unemployed people.[136] Most importantly, article 16 of ILO Convention N.168 established a link between unemployment benefit, wellbeing and welfare. Particularly, it prescribes that States have the obligation to ensure that the amount of unemployment benefit in conjunction with other benefits shall provide 'healthy and reasonable living conditions [to unemployed people] in accordance with national standards'.[137]

ILO Conventions N.102 and N.168 have adopted similar provisions concerning the cases where unemployment benefit could be suspended. For example, being absent from the territory and obtaining unemployment benefit fraudulently constitute valid reasons for suspending the unemployment benefit.[138] Nevertheless, there is a core difference among the two ILO Conventions regarding redeployment programmes. Article 69(h) of ILO Convention N.102 refers to employment services in general which if an unemployed person has 'failed to make use', unemployment benefit may be suspended. Whereas, article 20(f) of ILO Convention N.168 sets out the different facilities, which includes redeployment programmes, that an unemployed person should use. Most importantly, the protection which is provided in ILO Convention N.168 is higher concerning the use of redeployment programmes. Specifically, article 69(h) of ILO Convention N.102 states that the individual shall not be entitled to receive unemployment benefit if the person 'failed to make use of the employment services'.[139]

[133] Ibid, article 9.
[134] ILO Recommendation N.191, article 10.
[135] ILO Convention N.168: Convention concerning Employment Promotion and Protection against Unemployment (75th ILC session Geneva 21 June 1988), Preamble.
[136] Ibid.
[137] Ibid, article 16.
[138] Ibid, article 20; ILO Convention N.102, article 69 (a) and (d).
[139] ILO Convention N.102, article 69(h).

Whereas ILO Convention N.168 provides that the individual shall be not entitled to unemployment benefits only if the person 'failed without just cause to use the facilities available for placement, vocational guidance, training, retraining or redeployment in suitable work'.[140] This shows that States under ILO Convention N.102 can place pressure upon workers to join or cooperate with a redeployment scheme and take any job offer or participate in any training scheme, even where this does not necessarily satisfy the individual's own interests or needs. The individual may accept such offers to ensure that he or she will not end up without a job but also to avoid being excluded from unemployment benefits. Under these circumstances, it seems that there is a risk of exposing individuals to precarious employment, as the individual may accept to work under poor working conditions (e.g. low pay, working long hours, undertaking excessive working tasks) or training without future prospects (i.e. after the end of training, the individual might end up unemployed again because the skills that has acquired through training cannot increase employability). Whereas, an individual under ILO Convention N.168 might not feel the same level of pressure as under ILO Convention N.102 because the individual has the right to refuse to take up a job or training if there is a 'just cause', which is a term that is interpreted at domestic level.[141]

It is interesting that in the case of Cyprus, which only ratified ILO Convention N.102 (not ILO Convention N.168),[142] inactive people or people that refuse to cooperate with a redeployment scheme without just cause are also excluded from the minimum guaranteed income scheme (MGI), which was introduced by Cypriot Law 109(I)/2014 as an economic security measure to tackle poverty.[143] This means that individuals in Cyprus may be excluded from unemployment benefits in compliance with ILO Convention N.102 if they refuse to take up a suitable job (Cypriot Law N.59(I)/2010), but they could still be granted a basic allowance under the MGI, if there are serious personal circumstances (such as, severe family circumstances, family responsibilities and childcare), in which the individual is incapable (in Greek: 'ανίκανος προς εργασία) to take up the job offer or participate in a training scheme.[144]

The CEACR has noted that article 69 of ILO Convention N.102 shall be interpreted in conjunction with article 20 of ILO Convention N.102, which describes unemployment as lack

[140] ILO Convention N.168, article 20(f).
[141] Ibid.
[142] ILO official website, <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312247> accessed 13 April 2019; Cypriot Law N.158/1991, ILO Convention N.102 ratified by Cyprus 3 September 1991.
[143] Cypriot Law 109(I)/2014.
[144] Cypriot Law 109(I)/2014, articles 4(4)(d), 21 and 22; Cypriot Law N.59(I)/2010.

of 'suitable employment'.[145] In 2006, the CEACR has sent a Direct Request to the Government of Denmark by which it has distinguished the term of 'suitable employment' from 'reasonable employment'.[146] It also explained that 'reasonable employment' means a job position which might not be in conjunction with the occupational expertise of the unemployed person.[147] The CEACR criticised section 63 of the Danish Unemployment Insurance Act, which prescribes that in case where a person refuses the offered job position without a fair reason, this person is not entitled to be granted the unemployment benefit.[148]

The CEACR pointed out that using the term 'reasonable employment' instead of 'suitable employment' may create major issues.[149] It further explained the implications of the problem and referred to a case in which a number of 352 unemployed people refused to turn up to job interviews, in which they were obliged to pay a fee, or refused the offered job.[150] The reason that these people did not accept the job was related to the fact that the job offers were not within their occupational field.[151]

Since the term of 'suitable employment' was not explicitly defined in ILO Convention N.102, contracting States have the discretion to interpret it in accordance with their national standards.[152] Through a Direct Request to Belgium by the CEACR, the Belgian Government has been prompted to take into consideration the 'Guide to the concept of suitable employment in the context of unemployment benefit' in order to determine the concept of 'suitable employment'.[153] Since the Guidebook was published by the former Council of Europe Committee of Experts on Social Security (CS-SS), a technical committee of the CoE, whose mandate was to evaluate the ILO CEACR's conclusions (disbanded in 2012), the ILO has prompted Belgium to determine the definition of 'suitable employment' based on the CS-SS's guidebook..[154] In 2011, Belgium adopted the Ministerial Order by which it has redefined the

[145] ILO Convention N.168, article 20; ILO Convention N.102, article 69; CEACR Direct request on Convention N.102, Denmark (adopted 2006, published 96th ILC session 2007).
[146] Ibid.
[147] Ibid.
[148] Ibid; Consolidation (N.348 of 2014) of the Unemployment Insurance Act (N.1101 of 2013), section 63.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] ILO Convention N.102, article 20.
[153] CEACR Direct Request on Convention N.102, Belgium (adopted 2012, published 102nd ILC session 2013); Committee of Experts on Social Security (Council of Europe), 'Guide to the concept of suitable employment in the context of unemployment benefit' (2010).
[154] Explanatory Note Proposed merger Committee of Experts on Social Security (CS-SS)/ Governmental Committee of the Social Charter Ref: SG/Inf(2011)9 Rev.

concept of suitable employment.[155] This Order prescribed that a job position is considered as suitable only if it is within the distance of 60 kilometres, regardless the amount of travel time.[156] The CEACR emphasized that job position is suitable only if the distance and the travel time are reasonable.[157] It further reiterated that the Government of Belgium should take into consideration not only the distance but also the travel time in order to determine suitability of employment.[158]

Both Conventions prescribe that voluntary termination of employment, which is not based on fair grounds, may constitute a valid reason for suspending unemployment benefit.[159] ILO Convention N.168 inserted an additional exception regarding dismissals, which stipulates that the unemployment benefit may be suspended in case where 'the person has deliberately contributed to his or her own dismissal'.[160] This case sometimes could be blurred in practice with constructive dismissals, which are prohibited by ILO Convention N.158. The CEACR lastly clarified that the termination of employment based on economic reasons or the expiration of fixed-term contracts are not considered as fair reasons for suspending unemployment benefit.[161]

3.3.4 Educational benefit

The benefit for vocational education and training is not included in the branches of ILO Convention N.102 and the specialized Conventions. According to the concept of flexicurity, ALMPs and LLL that provide the opportunity to individuals (workers or unemployed people) to enhance their acquired skills and improve their employability, are essential to strike a fair balance and reduce the risk of poverty and unemployment. The 2008 ILO Declaration on Social Justice for a Fair Globalization recognized the vital role of acquiring the appropriate capacities and skills for the 'personal fulfilment and the common well-being'.[162] ILO Convention on Paid Educational Leave of 1974 (N.140) refers only to paid educational benefit for workers, whereas ILO Convention on Human Resources Development of 1975 (N.142) imposed obligations on States to provide vocational guidance and training for youth and adults

[155] Direct request to Belgium (n.157).
[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] ILO Convention N.168, article 20(c); ILO Convention N.102, article 69(i).
[160] ILO Convention N.168, article 20(b).
[161] CEACR Direct request on Convention N.168, Brazil (adopted 1998, published 87th ILC session 1999).
[162] ILO Declaration 2008, part A(I).

in all sectors and regardless their level of 'skill and responsibility'.[163] Although ILO Convention N.142 refers to 'sectors', which seems only applicable to workers, ILO Recommendation on Human Resources Development of 2004 (N.195) introduced the right to education and training for all.[164] The Recommendation laid out the three actors that play a crucial role in the enforcement of the right to education: Governmental authorities, enterprises and individuals.[165]

According to ILO Convention N.140, States may also take additional measures to ensure that particular categories of workers who struggle to 'fit into general arrangements' are entitled to educational benefit.[166] This Convention also stipulates that the level of amount of the paid educational benefit shall be 'adequate' and shall be paid regularly.[167] The term 'adequate' is used as a threshold which obligates States to provide a sufficient level of amount to give effect to the aims which are set out in article 3 of ILO Convention N.140. However, these aims, which include 'promotion of employment and job security', are quite broad.[168] This means the threshold of 'adequacy', which is a vague threshold that was introduced in article 7 of ILO Convention N.140, cannot actually protect the right to vocational education and training (as enshrined in the various UN treaties, which were discussed before) and ensure that the amount of educational benefit is sufficient enough.[169]

According to the 2013 ILC Report, ageing places a heavy burden on social security systems, through increased dependency rate for pensions support and a smaller working population that contributes to the social security schemes.[170] This shows that it is important to focus on the realization of LLL, adjusting older workers' capabilities to the demands of the labour market, so that they will be able to remain in the labour market as long as possible. The Human Resources ILO Recommendation N.195 (2004), which recognized that education and training as a right for all, sets as a core obligation for States and other stakeholders (social actors,

[163] ILO Convention on Human Resources Development, 1975 (No.142), article 4; ILO Convention on Paid Educational Leave, 1974 (N.140), article 1; ILO Recommendation on Paid Educational Leave, 1974 (N.148), article 1.
[164] ILO Recommendation on Human Resources Development, 2004 (N.195).
[165] ILO Recommendation (N.195), article 4.
[166] ILO Convention N.140: Convention concerning Paid Educational Leave (59th ILC session Geneva 24 June 1974), article 9.
[167] Ibid, article 7.
[168] Ibid, article 3.
[169] Ibid, article 7.
[170] ILC, 102th session, June 2013, 'Fourth item on the agenda: Employment and social protection in the new demographic context', <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_216325.pdf> accessed 17 February 2019, p.4, para.12.

enterprises) to invest and create training opportunities.[171] Educational and training schemes shall increase employability, which means that individuals will be able to 'secure and retain decent work, to progress within the enterprise and between jobs, and to cope with changing technology and labour market conditions'.[172] In the ILO context, States are responsible to fund education and training schemes, whereas employers shall provide the appropriate training to their workers.[173]

3.3.5 Health-related benefits

The health-related benefits for transitional employment consist medical, sickness and employment injury benefits, which are regulated by ILO Convention N.102 and the specialized Conventions (Conventions N.130 and N.121). In the UN CESCR's General Comment N.14 of 2000, the right to health includes economic accessibility (affordability), which means that States are responsible to ensure that individuals will get the funds as social security benefits to access the health-care services and get the appropriate medical treatment.[174] The ILO aims to ensure medical care for workers to 'maintain, restore or improve health status' and subsequently enable them to remain in the labour market.[175] ILO Conventions N.102 and N.130 regulate specific aspects of medical benefit, which includes cost-sharing, the qualifying period and the types of medical care.[176] Sickness benefit shall be provided to the worker due to 'incapacity for work resulting from a morbid condition and involving suspension of earnings, as defined by national laws or regulations'.[177] ILO Conventions N.102 (Part III) and N.130 set specific rules for sickness benefit, such as the duration of the benefit and the method for calculating the amount.

The employment injury benefit, which is regulated ILO Conventions N.102 and N.121, provide income security for workers 'due to an accident or prescribed disease, which resulted from employment'.[178] The employment injury benefit aims to 'maintain, restore or improve the

[171] ILO Recommendation N.195, article 4(a).
[172] Ibid, article 2(d).
[173] Ibid, article 4(b).
[174] UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment N.14' (11 August 2000) UN Doc E/C.12/2000/4.
[175] ILO Convention N.102, article 10(3); ILO Convention N.130: Convention concerning Medical Care and Sickness Benefits (53rd ILC session Geneva 25 June 1969), article 9.
[176] ILO Convention N.102, article 10(2).
[177] ILO Convention N.102, article 14.
[178] Ibid, articles 31 and 32.

worker's health and his ability to work but also to cover his personal needs'.[179] The ILO Conventions *inter alia* set out the norms for calculating the benefit based on the severity of loss (i.e. total loss, substantial partial loss, non-substantial partial loss or slight degree of incapacity).[180]

These health-related social security standards, which facilitate the worker's transition from incapability to employment, integrate in their core the promotion of human dignity. However, these standards do not ensure that the worker will return to the same or equivalent job. Instead, these benefits focused on the individual and his or her capabilities, which will enable the transition in the labour market, rather on individual return to the position possessed before injury or disease occurred. It seems that only for maternity has the ILO established a link between health protection and job security, as the female worker (after pregnancy) has the right to return to the same or equivalent position.

3.4 Sustainable Development Goals (SDGs)

The Sustainable Development Goals (SDGs) are a set of 17 goals in the UN Development Agenda. The UN Resolution 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development', which was adopted by the UNGA presented these 17 SDGs that came into force on 1 January 2016.[181] The SDGs 2016-2030 replaced the eight Millennium Development Goals (MDGs) 2000-2015,[182] which were focused more on developing States.[183] The SDGs set universal goals that apply to all States, regardless of the level of development.[184]

SDGs, which are inter-connected, have a three-fold mandate: to promote economic growth, social inclusion and environmental development.[185] Extreme poverty remains 'the greatest global challenge and an indispensable requirement for sustainable development', which justifies why it appears as SDG 1 (eradicate poverty).[186] SDGs might seem to entail low level

[179] Ibid, article 34(4); ILO Convention N.121: Convention concerning Benefits in the Case of Employment Injury (48th ILC session Geneva 08 July 1964), article 10(2).
[180] ILO Convention N.121, article 14; ILO Convention N.102, article 36.
[181] UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1.
[182] Ibid.
[183] ILO, Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators (2018) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_647109.pdf> accessed 6 March 2019, p.12.
[184] Ibid.
[185] UNGA Res 70/1 (n.181).
[186] Ibid.

obligation and little enforcement, although they are to be mainstreamed into all aspects of the UN system.[187] SDGs as soft-law modes of governance are used for 'integration purposes', respecting the principle of sovereignty.[188] Similarly, the Open Method of Coordination (OMC), as an EU policy-tool for reflexive regulation in the European Employment Strategy (EES) and Social OMC, also set broad targets, in which multiple actors can participate. This shows that these two systems converge because they use broad agendas as soft-law modes of governance, which are forms of deregulation that could further lead to re-regulation.

The 2030 SDGs provide a labour-related human rights-based approach. Rakhyun E. Kim observed that SDGs and targets derive from already existing international (intergovernmental) law norms.[189] SDG 8 ('Decent work and economic growth') deals with many topics that fall in the scope of the ILO's mandate. However, this does not mean that the ILO is the only UN body that is responsible for SDG 8. According to the 2016 UNGA Report, UN institutions cannot be responsible for a specific SDG.[190] SDG 17 (partnerships for the goals) enshrined 'the vehicles for delivery on SDGs', which entail collaboration and partnerships of many actors (i.e. international organizations, governmental authorities, civil society and enterprises), whereas MDGs just involved international organizations.[191] The ILC Report 'Towards 2030: Effective development cooperation in support of the Sustainable Development Goals' (107th session, 2018) discussed the role of the ILO for 'development cooperation', which was characterized as 'a strong supporter, a team player, and a stakeholder in the UN reform process'.[192] In this context, the ILC Report of 2018 recalled the two-fold role of social dialogue and tripartism: as a fundamental objective of the ILO and as a means to achieve other constituent goals of the ILO (such as, social security protection).[193]

SDG 8 is focused on employability as part of economic growth rather than on employment security. The rate of unemployment, which is used as one of the core ILO indicators, just shows 'the inability of an economy' to provide job opportunities to people that are available to

[187] Persson A., Weitz N. and Nilsson M., 'Follow-up and Review of the Sustainable Development Goals: Alignment vs. Internalization' (2016) 25(1) *Review of European Comparative & International Environmental Law* 59.
[188] Ibid.
[189] Rakhyun E.K., 'The Nexus between International Law and the Sustainable Development Goals' (2016) 25(1) *Review of European, Comparative and International Environmental Law* 15, p.16.
[190] UNGA Report of the Secretary-General on Critical Milestones towards Coherent, Efficient and Inclusive Follow-up and Review at the Global Level (2016) UN Doc A/70/684 <https://digitallibrary.un.org/record/819767> accessed 12 August 2019.
[191] Decent work and the SDGs, Labour market indicators (n.183), p.63.
[192] ILC, 107th session, 2018, 'Report IV: Towards 2030: Effective development cooperation in support of the Sustainable Development Goals'.
[193] Ibid, p.54.

accept a job offer.[194] It seems that it is a pitfall that SDG 8 and its follow-up reports do not examine the normative regulation of job security, which could expose workers to the risk of unemployment or precarious work. For example, the 2017 Report of the UN Secretary-General refers to labour productivity and the unemployment rate.[195] It suggested that employability (tackle unemployment and underemployment), could possibly be achieved through green jobs, such as in renewable energy sectors.[196]

SDG 8.5 target sets as an aim to achieve full employment for all men and women by 2030. This target is related *inter alia* to SDG4 (education), SDG 5 (gender equality) and SDG 10 (reduce inequalities). SDG 4's mandate is to 'ensure inclusive and equitable quality education and promote lifelong learning opportunities for all'.[197] SDG 4 is related to target 8.6, according to which the rate of young people that are excluded from employment, education or training shall be reduced by 2020.[198] Target 5.1. calls upon all the relevant actors to end discrimination against women.[199] Target 10.2. refers to the promotion of socio-economic inclusion for all, regardless of their status (i.e. age, sex, disability, race, ethnicity, origin, religion or economic or other status).[200] SDGs target adopted a broader list of discriminatory grounds than those in the list in ILO Convention N.111 (e.g. age is not included in ILO Conventions N.158 and N.111), which shows the ambitious plan of SDGs for achieving sustainable development. The follow-up reports also provide some suggestions, which could be used to reach SDGs and targets. For example, according to the 2016 Global Sustainable Development Report, inclusive labour markets for people with disabilities could be achieved through creating incentives for employers (such as tax credits or work modifications).[201]

The 2019 Expert Group Report on SDG8 before the HLPF 2019 flagged up the key global challenges that were also discussed in the 2016 High-Level Political Forum (HLPF), which include lack of employment opportunities, informal employment and labour market

[194] Decent work and the SDGs, Labour market indicators (n.183), p.26.
[195] UN ECOSOC, 2017 Session, Agenda items 5,6 and 18(a), 'Progress towards the Sustainable Development Goals Report of the Secretary-General' <http://www.un.org/ga/search/view_doc.asp?symbol=E/2017/66&Lang=E> accessed 17 February 2019, p.19.
[196] UN Global Sustainable Development Report 2016, <https://sustainabledevelopment.un.org/content/documents/2328Global%20Sustainable%20development%20report%202016%20(final).pdf> accessed 17 February 2019, p.86.
[197] Ibid.
[198] Ibid.
[199] UN official website on SDGs <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 17 February 2019.
[200] Ibid.
[201] UN Global Report 2016 (n.196), p.16.

inequality.[202] The HLPF was established by the 2012 UN Conference on Sustainable Development and replaced the Commission on Sustainable Development.[203] According to the UNGA Report of 2016, the HLPF, which works under the auspices of the ECOSOC, is a follow-up mechanism for SDGs.[204] It is a reflexive mechanism because the Member States, the UN entities, major groups and other stakeholders are involved in the consultation process, before the adoption of the final Report by UN Director-General.[205] In 2016, the EU also issued a statement, in which it stated that the EU and its Member States support the review and follow-up framework of the HLPF, which will promote inclusivity and accountability.[206]

The HLPF derives information from: a) the annual thematic reports b) the Global Sustainable Reports and c) the voluntary national reviews. The 2017 Synthesis Report on Voluntary National Reviews (VNRs), as follow-up mechanism for SDGs, conceives of social security and employment as two distinct parts in the SDG context. On the one hand, the Report pointed out that many States flagged up how sustainable social security systems could progressively eradicate poverty levels (SDG 1).[207] On the other hand, it stated that young and older workers in Belgium, Portugal and Slovenia struggle to enter or return to the labour market, whereas, workers in Thailand face problems with job insecurity.[208] The 2016 Global Sustainable Report reflected on social security systems in the context of SDGs. The 2016 Report stated that social protection, which includes contributory and non-contributory funds, means: 'capturing how members in societies support each other in times of distress'.[209] SDG 10 encompasses social

[202] Expert Group Meeting in preparation for HLPF 2019: Empowering people and ensuring inclusiveness and equality (15 February 2019), <https://sustainabledevelopment.un.org/content/documents/21441EGM_SDG_8_Concept_Note_15_Feb_2019.pdf> accessed 27 July 2019,p.3; UNGA, 68th session, agenda item 19, 'Summary of the first meeting of the high-level political forum on sustainable development' <http://www.un.org/ga/search/view_doc.asp?symbol=A/68/588&Lang=E> accessed 17 February 2019.
[203] UN official website, <https://sustainabledevelopment.un.org/csd.html> accessed 17 February 2019.
[204] UNGA, 70th session, agenda items 15 and 16, 'Critical milestones towards coherent, efficient and inclusive follow-up and review at the global level'A/70/684 <http://www.un.org/ga/search/view_doc.asp?symbol=A%20/70/684&Lang=E> accessed 17 February 2019, para.22.
[205] UN official website on SDGs knowledge platform, <https://sustainabledevelopment.un.org/hlpf/follow-up> accessed 17 February 2019.
[206] Follow-up to, and review of, the 2030 Agenda for Sustainable Development Plenary meeting convened by the co-facilitators EU statement United Nations, New York, 17 March 2016, <https://sustainabledevelopment.un.org/content/documents/21096EU%20statement.pdf> accessed 17 February 2019.
[207] UN Voluntary National Reviews 2017, <https://sustainabledevelopment.un.org/content/documents/17109Synthesis_Report_VNRs_2017.pdf> accessed 17 February 2019, p.5.
[208] Ibid, p.17.
[209] UN Global Report 2016 (n.196), p.11.

security protection, which is seen as a means to tackle global inequalities (target 10.4).[210] It further reflects on weak social protection schemes in many countries, since only 27 percent of the global population have access to the so-called 'comprehensive social protection system'.[211] Moreover, SDG 16 endorsed the participatory engagement and capacity-building to create inclusive institutions for all, which established the link between social dialogue and the future of work.[212]

3.5 Conclusion

The systems of employment security and social security appear as two distinct concepts in the international regime. They both encompass the principle of non-discrimination, which is recognized as a fundamental aim in the ILO Declaration 1998 and the UN Charter. The UN entities, the ILO and the UN human rights-related bodies, developed strong relations with the EU and the CoE. Transnational labour regulation for employment security, which could be understood as part of the ILO's mandate for full employment (ILO Declaration 2008), is governed by ILO Convention N.158 and the UN labour-rights based treaties such as the ICESCR and CEDAW. ILO Convention N.158, the centrepiece for job security regulation that covers individual and collective dismissals, has two important deficiencies. First, the States can exclude workers from its scope of protection, such as public workers. This could be mediated to an extent through SDGs, which adopted a holistic and universal approach towards decent work for all, with the slogan: 'no one left behind'.[213] Second, the category for collective dismissals, which are brought under the concept of 'operational requirements' is not precise. This means that regulation for collective dismissals shall be further clarified at regional and domestic level (e.g. EU Directive 98/59). In addition, the UN human rights-based treaties and ILO Conventions promote employment security as part of the right to non-discrimination. ILO Convention N.111 adopted an open list for discriminatory grounds, which shows that it is adjusted to the universal character of the UN human rights-based regime.

ILO Convention N.102, as the landmark instrument for social security protection, is divided into different branches and adopted a two-tier level of protection, which reflects the diversities of the national social security systems. It is interesting that the EU participated in the ILC

[210] UN official website on SDGs (n.207).
[211] UN Global Report 2016 (n.196), p.12.
[212] Ibid.
[213] SDGs Report 2016 <https://unstats.un.org/sdgs/report/2016/leaving-no-one-behind> accessed 12 August 2019.

discussion for ILO Recommendation N.202 (Social Protection Floors) because EU Regulations have not endorsed minimum standards for social security protection. ILO Convention N.183 (maternity leave) could be characterized as the most modern specialized ILO instrument because it promotes transitional employment through internal flexible working arrangements at enterprise level.

It seems a milestone that the educational benefit is integrated in the UN/ILO context as part of the right to education and vocational training, which is an aspect of transitional employment that does not explicitly appear in the regional (European) regime. Due to demographic changes, it is crucial to invest on the LLL and ALMPs. As the Future of Work Reports flags up, the global challenges (e.g. green economy and artificial intelligence) could create jobs, which the individuals could take up after getting the adequate training and remain in the labour market. The labour-rights based approach is further strengthened in the SDGs and the Future of Work Initiative, which focus *inter alia* on LLL, ALMPs, gender equality and transitions in the labour market. The question that remains is to what extent these soft-law modes of governance create room for actual multi-level social dialogue.

Chapter 4: Council of Europe

4.1 Introduction

The Council of Europe (CoE) was founded in May 1949 as one of the Cold War initiatives to promote human rights, pluralist democracies and the rule of law.[1] After the end of World War II, the Western European States had serious concerns over the spread of fascism and communism in Europe, which at that time was 'a war-shattered continent'.[2] In the early 1950s, the 'European Movement', which was an international organization that promoted European unity, proposed the adoption of the European Convention on Human Rights (ECHR), as an 'alarm bell' to protect Europe against the rise of totalitarian regimes and oppression.[3] Michael O'Boyle, the Deputy Registrar of the European Court of Human Rights (ECtHR) characterized the ECHR 'as one of the most remarkable phenomena in the history of international law',[4] which seems to manifest the aspirations of the UDHR as it is also indicated in the ECHR *travaux préparatoires*.[5] According to the ECHR Preamble, the ECHR promotes the 'collective enforcement of certain of the rights enforced in the UDHR'.[6] It appears that the ECHR, which was described by Sir David Maxwell-Fyfe (one of the founding leaders of ECHR) as 'a light' and 'a beacon in totalitarian darkness',[7] primarily focused on political and civil rights. This means that the ECHR was not directed at the protection of social and economic rights, that include the right to work and the right to social security, which both were subsequently protected under various UN/ILO instruments (e.g. ICESCR and ILO Convention N.102) as analysed in the previous chapter.

Nevertheless, ECtHR adopted an evolutive interpretative approach over the ECHR, according to which the ECHR as 'a living instrument' contains non-static rights that reflect social changes.[8] This 'living principle' that was initially introduced in the *Tyrer v. UK* case (1976),[9] established a normative framework, according to which socio-economic rights are protected if

[1] Statute of the Council of Europe.
[2] Bates E., *The evolution of the European Convention on Human Rights: from its inception to the creation of a permanent court of human rights* (Oxford University Press 2010), p.5.
[3] Ibid, p.7.
[4] Ibid.
[5] Travaux préparatoires ECHR <https://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf> accessed 15 April 2019.
[6] ECHR, Preamble.
[7] Bates (n.2), p.7.
[8] *Tyrer v The United Kingdom* App no 5856/72 (ECtHR, 25 April 1978).
[9] Ibid.

they fall in the ambit of civil and political rights as guaranteed in the ECHR. In *Airey v. Ireland*, the ECtHR explained that it may extend its interpretation into the sphere of socio-economic rights as civil and political rights, which are the main elements of the ECHR, may also have social and economic implications.[10] It further stated that 'there is no water-tight division separating that sphere from the field covered by the ECHR.[11] The latter phrase, that was expressed by the ECtHR, could illustrate a link between the ECHR and the UDHR maxim, according to which human rights are universal, indivisible, interdepended and interrelated.[12] In *N. v. UK* (2008), the ECtHR gave more emphasis on the primary role of the ECHR (i.e. to protect civil and political rights) rather than its implications, which might entail protection of social and economic rights.[13]

Rolv Ryssdal, who was former President of the ECtHR (1991), had already expressed that the *Airey* case shall be used as a remarkable case of reference.[14] He explained that 'the democratic State under the rule of law, […] must […] necessarily be a social State under law.'[15] He also clarified that the ECHR does not explicitly fulfil such social aims, however, the ECtHR is not restrained from 'taking increased account of the social dimension in the interpretation and application of the rights and freedoms, where this is required by social conditions in our countries'.[16] In regards to this research project, this chapter explores to what extent the ECtHR teleological approach led to the embodiment of employment security and social security standards in the realm of other political and civil rights.

This chapter also seeks to identify and evaluate the employment security and social security (contributory and non-contributory) standards that are developed in the European Social Charter (ESC) of 1961 and the European Social Charter (Revised) (RSC), which revised the original Charter in 1996. The ESC and the RSC set binding legal obligations and cover a comprehensive list of work-related and social security rights - such as, the right to work, the right to maternity leave, the right to social security and the right to protection against unlawful

[10] *Airey v. Ireland* App no 6289/73 (ECtHR, 9 October 1979), para.26.
[11] Ibid.
[12] UDHR, Preamble.
[13] *N. v. the UK* App no 26565/05 (ECtHR, 27 May 2008), para.44.
'the [ECHR] is essentially directed at the protection of civil and political rights' even if there are socio-economic implications.
[14] Ryssdal R., 'The Protection of Social and Economic Rights and the European Convention on Human Rights and Fundamental Freedoms – Written Address', in Franz Matscher (ed) *Die Durchsetzung wirtschaftlicher und sozialer Grundrecht: The Implementation of Economic and Social Rights* (Engel 1991), p.4.
[15] Ibid.
[16] Ibid.

dismissals.[17] Unlike the ECHR, it is not compulsory for States to ratify the ESC/RSC as a condition of their membership. For example, Cyprus, which is used as case study in this research project, ratified the ESC on 7 March 1968 by Cypriot Law N.64/1967 and the RSC on 27 September 2000 by Cypriot Law N.27(III)/2000. However, the Member States of the CoE have also the capacity to select discrete provisions for ratification. For example, Cyprus accepted 63 of its 98 paragraphs at the time of ratification and further accepted to be bound by nine additional provisions in 2011 (by Cypriot Law N. 17(III)/2011). In this context, Cyprus did not accept *inter alia* the provision, which protects the right to information and consultation (article 21 RSC) and the right to social assistance for reasons related to sickness (article 13(1) RSC).[18] As the compliance with the ECR/RSC is solely monitored through the European Committee of Social Rights (ECSR), a non-judicial monitoring mechanism, the ECSR is only able to monitor and influence the creation of standards at the domestic level.

Over the years, the CoE has developed strong external relations with the transnational regulatory systems that are examined in this research project (i.e. UN/ILO and EU). In 1951, the CoE and the UN concluded the Agreement between the Secretariat General of the Council of Europe and the Secretariat of the UN, which was renewed in October 1989.[19] Since 2000, the two systems have adopted a bi-annual Resolution, flagging up the key challenges and specifying their working methods.[20] In 2016, Ban Ki-Moon, who was the UN Secretary General, characterized the CoE as 'instrumental in advancing the principles of democracy and human rights in Europe'.[21] In 1952, the ILO as a UN specialized agency also concluded an Agreement with the CoE, whose details were analysed in the previous chapter.[22] ILO

[17] European Social Charter (18 October 1961) ETS 35 (ESC); European Social Charter (Revised) (3 May 1996) ETS 163 (RSC).
[18] Official Website of CoE <https://rm.coe.int/pdf/1680492884> accessed 15 April 2019.
[19] UN-CoE Agreement between the Secretariat General of the Council of Europe and the Secretariat of the United Nations (15 December 1951) < https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168059acd8> accessed 10 March 2019; UN-CoE Arrangement on Co-operation and Liaison between the Secretariats of the United Nations and the Council of Europe (19 November 1971).
[20] UNGA, 33rd session, Res 'Observer status for the Council of Europe in the General Assembly' (1989) UN Doc A/RES/44/6.
[21] Letter of 2 December 2016 of UN SG Ban Ki-Moon to CoE SG <https://rm.coe.int/der-inf-2018-1-rev-e/16808d5afd> accessed 10 March 2019.
[22] ILO and CoE Agreement <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/genericdocument/wcms_440247.pdf > accessed 10 March 2019.

representatives participated in the Committee on the European Social Charter (or Charte-Rel), which prepared the text of the RSC.[23]

Since 1958, the CoE has also developed a close relationship with the EU. The bilateral Agreement described the nature of their mutual activities. The EC, representing the EU, may be invited by the CoE to participate in the Committees of the Council of Ministers or other conferences of specialized ministers.[24] Second, the EU can become a contracting party to the CoE's treaties.[25] In this context, the EU ratified seven CoE Conventions, although none of them regulate topics related to employment security and social security.[26] In 1996, the two European organizations exchanged letters for consolidation and intensification of their cooperation.[27] In the next chapter, I also discuss Opinion 2/13 and accession of the EU to the ECHR, which still remains a theoretical debate.[28]

4.2 Employment security, job security and human rights

4.2.1 European Convention on Human Rights (ECHR)

The ECHR, as explained in the first section, primarily focused on civil and political rights. In the ECtHR jurisprudence, it is shown that there are certain aspects of the right to work, as a social right,[29] that implicitly fall in the ambit of ECHR (article 6 and articles 8-11 ECHR), such as the protection against dismissal for unlawful reasons. For example, dismissal of an employee because he had extra-marital relationship (*Obst v. Germany*), which is analysed in section 4.2.1.2, was examined by the ECtHR in the spectrum of article 8 (the right to private

[23] Official website of the CoE <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2517196&SecMode=1&DocId=2039078&Usage=2> accessed 10 March 2019.
[24] CoE and EU Agreement <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064c45d> accessed 10 March 2019.
[25] Ibid.
[26] CoE official website, <https://www.coe.int/en/web/conventions/search-on-states/-/conventions/treaty/country/1> accessed 10 March 2019.
[27] CoE, 'Exchange of letters between the Secretary General of the CoE and the President of the Commission of the European Communities on 5 November 1996 supplementing the 'Arrangement' between the CoE and the European Community concluded on 16 June 1987' <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064c45d> accessed 10 March 2019.
[28] Opinion 2/13 of the Court pursuant to Article 218(11) TFEU [2014] OJ C65/2.
[29] Mantouvalou V. (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2017), p.2.

life).[30] As Hugh Collins explained in his chapter entitled 'Is There a Human Right to Work', the right to work has 'hybrid quality'.[31] The negative aspect of the right to work, which entails protection from unjustifiable discrimination and barriers from employment, takes the form of a traditional civil liberty.[32] Whereas, the positive aspect of the right to work has characteristics of social and economic rights.[33] The right to work, as a composite right, has different ingredients that could promote employment security – such as the right to access labour market and job security standards. To embark on this investigation, this section draws on the evolving jurisprudence of the ECtHR. First, it begins with the right to fair trial (article 6 ECHR), which entails analysis of the State's obligation and immunity for civil servants. Second, it looks at employment security standards as a means for protecting the following human rights that are guaranteed in the ECHR: the right to respect for private life (article 8 ECHR), the right to manifest one's religion (article 9 ECHR), the right to freedom of expression (article 10 ECHR) and the negative right not to join a trade union (article 11 ECHR).

4.2.1.1 Employment security, State immunity and public sector employment

The right to fair hearing, as a civil right guaranteed in article 6 of ECHR, has recognised State immunity disputes in employment matters that include public employees. In *Fogarty v. UK*, the ECtHR observed that State immunity in respect of employment-related disputes is subject to limitations,[34] but latitude is given to 'sensitive and confidential issues related to the diplomatic and organizational policy of a foreign State'.[35] Complaints related to 'the recruitment, careers and termination of services of public servants' also tend to be excluded from the scope of article 6(1) ECHR.[36] For example, in *Neigel v. France*, the ECtHR stated that the applicant who was employed by the city council requesting reinstatement, did not fall in the ambit of article 6(1) ECHR.[37]

The ECtHR has however adopted a new 'functional criterion based on the nature of the employee's duties and responsibilities' to determine whether article 6(1) ECHR applies to public servants.[38] In *Pellegrin v. France*,[39] the ECtHR explained that the State as part of its

[30] *Obst v. Germany* App no 425/03 (ECtHR, 23 September 2010).
[31] Mantouvalou (n.29), p.26.
[32] Ibid.
[33] Ibid.
[34] *Fogarty v. the UK* App no 37112/97 (ECtHR, 21 November 2001), para.37.
[35] Ibid.
[36] *Massa v. Italy* App no 14399/88 (ECtHR, 24 August 1993), para.26.
[37] *Neigel v. France* App no 18725/91 (ECtHR, 17 March 1997).
[38] *Pellegrin v. France* App no 28541/95 (ECtHR, 8 December 1999), para.64.
[39] Ibid.

sovereign power has 'a legitimate interest in requiring of these servants a special bond of trust and loyalty' for some public-sector posts that are regulated by public law.[40] In this context, the ECtHR referred to the EC 1988 Communication, which explicitly sets out the activities that are included in the public service and safeguard the interests of the State (such as police and public health services).[41] It further stated that article 6(1) ECHR does not apply in disputes between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law.[42] As the applicant had responsibilities which were within the State's sovereign power, the applicant's case did not fall in the ambit of article 6(1) ECHR.[43]

The *Cudak v. Lithuania* case indicates that the ECtHR was more willing to examine cases on job security rather on employment security. In *Cudak*, the applicant was employed as secretary and switchboard operator by the Embassy of the Republic of Poland in Lithuania,[44] and had lodged a sexual harassment complaint before the Equal Opportunities Ombudsman which was upheld and sick leave granted.[45] She was not however admitted back on the Embassy premises after taking sick leave and the Embassy's assertion that she was barred from brining a civil claim for dismissal on grounds of diplomatic immunity was upheld by the Supreme Court of Lithuania. The ECtHR held that there was violation of article 6(1) ECHR because the measure of dismissal was not proportionate, placing emphasis on the incidence of sexual harassment.[46] This suggests that there can be limited but still residual protection from dismissal (namely of job security) under article 6 ECHR even where State immunity might often be invoked.

4.2.1.2 ECHR rights and dismissals: articles 8-11 ECHR

Employment security standards, which either appear in the form of protection against unfair or unlawful dismissal, are indirectly integrated in the ECHR regime in cases that entail protection of non-absolute rights, which are protected under articles 8-11 ECHR. These rights consist of: the right to respect of private and family life (article 8 ECHR), the freedom of thought, conscience and religion (article 9 ECHR), the right to freedom of expression (article 10 ECHR)

[40] Ibid, para.65.
[41] EU Communication from the Commission of the European Communities published in OJEC no. C 72 of 18 March 1988, "Freedom of movement of workers and access to employment in the public service of the Member States – Commission action in respect of the application of Article 48(4) of the EEC Treaty".
[42] *Pellegrin v. France* (n.38).
[43] Ibid, paras.70-71.
[44] *Cudak v. Lithuania* App no 15869/02 (ECtHR, 23 March 2010).
[45] Ibid.
[46] Ibid, paras.71-75.

and the freedom of assembly and association (article 11 ECHR). These provisions sometimes are examined in relation to article 14 ECHR, which safeguards the right to non-discrimination that can only be invoked in conjunction with other substantive provisions. In addition, Protocol 12 to ECHR, which entered into force in 2005, which was also ratified by Cyprus (Cypriot Law 13(III)/2002), has guaranteed a self-standing principle of non-discrimination.[47] The State has the power to interfere and restrict individual's rights under articles 8-11 ECHR, if the taken measure fulfils one of the following criteria/exceptions, as mutually set in the second paragraph of articles 8-11 ECHR: a) the interference shall be in accordance with law b) the measure shall be necessary in a democratic society. This section looks at examples of cases, which deal with rights under articles 8-11 ECHR, and seeks to explore the set of controls that are established in relation to employment security.

I. Article 8 ECHR: right to respect private and family life

Article 8 ECHR, which as a multi-faceted right pertains to a range of individual's interests, places on States the obligation to respect for private and family life. Dismissal might entail repercussions on individuals' private lives or be based on private information. In such circumstances article 8 ECHR is engaged. In *Sidabras and Džiautas v. Lithuania*, the applicants were excluded from the labour market.[48] The ECtHR held that the right to choose occupation does not explicitly fall within the ambit of article 8 ECHR. However, it was found that the ban on taking up private sector employment because both applicants had the status of 'former KGB officers' did affect their private life.[49] The publicity of the issue and its application to them affected their ability to engage and create professional networks. The status of 'former KGB officers' acted as an impediment for the applicants in the search of job, which excluded them from the labour market.

The ECtHR further examined whether the duty of loyalty that is imposed by a church can restrict the right to private and family life but could justify the dismissal of employees. There are multiple church cases, in which the ECtHR held that the individual cannot be dismissed because he beached his duty of loyalty by having extra-marital relationship. In *Schüth v. Germany*, the applicant, who was a priest at a Catholic parish church, was dismissed because

[47] Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination (4 November 2000) ETS 177.
[48] *Sidabras and Džiautas v. Lithuania* App nos 55480/00 and 59330/00 (ECtHR, 27 July 2004). For HIV-infection as a reason for dismissal, see *I.B. v. Greece* App no 552/10 (ECtHR, 3 October 2010).
[49] Ibid.

he was going to have another child with his new partner.[50] The Catholic parish church claimed that the applicant breached his duty of loyalty, because he had an extra-marital relationship with another woman.[51] The ECtHR held that the domestic tribunals failed to explain the reasons why the interests of the Catholic Church as a collective right outweighed the applicant's individual right to respect for his private and family life (article 8 ECHR).[52] A duty of loyalty towards the Catholic church did not mean 'a personal unequivocal undertaking to live a life of abstinence in the event of separation or divorce'.[53] The ECtHR identified a normative gap in the German legislation (transposing EU Directive 2000/78), according to which German General Equal Treatment Act did not enshrine a provision to protect difference in treatment if the religion constituted a genuine, legitimate and justified occupational requirement.[54]

II. Article 9 ECHR: the right to manifest religion or belief

This section looks at complaints, which arose in transnational workplaces, that entail State interference in the *forum externum* of the right to freedom of religion: the right to manifest religion or belief.[55] The analysis seeks to explore the cases in which restriction to manifest religion or belief could act as a legitimate justification for dismissals. In the context of employment, workers sometimes seem to voluntarily accept to limit their right to manifestation of religion or belief, by accepting a job offer that sets as a condition that entails the restriction of their right to manifest religion or belief. This voluntary acceptance was described by Lucy Vickers as 'a specific situation rule'.[56] However, the individual might have accepted to limit the right to manifestation because he or she felt pressure that if he or she had refused to do so, his or her application would have been rejected, which means that he or she would have being exposed to a serious risk of unemployment.

The ECtHR has examined *inter alia* whether the manifestation of religion at the workplace, which led to employment sanctions that included dismissals, constituted violation of article 9 in conjunction with article 14 ECHR and has sometimes found that it does so.[57] Nevertheless,

[50] *Schüth v. Germany* App no 1620/03 (ECtHR, 23 September 2010); *Obst v. Germany* App no 425/03 (ECtHR, 23 September 2010).
[51] Ibid (*Schüth*).
[52] Ibid.
[53] Ibid, para.71.
[54] Ibid, paras.41-43.
[55] Barras A., 'Transnational Understanding of Secularisms and Their Impact on the Right to Religious Freedom – Exploring Religious Symbols Cases at the UN and ECHR' (2012) 11 *Journal of Human Rights* 263, pp.264-265.
[56] Vickers L., *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2016), p.101.
[57] *Eweida v. UK* App no 48420/10 (ECtHR, 4 February 2014).

it seems that it plays a key role whether the employee was aware about the specific working tasks, which entail restriction of the employee's rights to manifest religion or belief, before or after accepting the job offer. The claim made by Mr McFarlane (as the fourth applicant in *Eweida*), who was dismissed for gross misconduct by private company because he did not provide counselling services to same-sex couples, was rejected by the ECtHR.[58] As the ECtHR explained, the applicant, whose application was also dismissed by the Employment Tribunal, had voluntarily accepted to take part in the 'post-graduate training programme in psycho-sexual counselling'.[59] Before his admission to the programme, the applicant was aware that it would not be possible to exclude clients due to their sexual orientation because the programme launched 'an Equal Opportunities Policy'.[60]

III. Article 10 ECHR: the right to freedom of expression

Article 10 ECHR enshrines freedom of expression 'as one of the cardinal rights guaranteed under the Convention', and has led to cases where employees are dismissed because they exercised their right to free speech.[61] As established in *Fuentes Bobo v. Spain*, the applicant's dismissal by a private enterprise (TVE) because he publicly criticized his manager's behaviour, was not 'reasonably proportionate' to the legitimate aim pursued.[62] The ECtHR's approach was not affected by the fact that the decision for dismissal was imposed as penalty under disciplinary proceedings. As the ECtHR explained, the State under certain circumstances has a positive obligation to protect the right to freedom of expression, even if the case involves a private law undertaking.[63]

It seems that the approach of the ECtHR was altered in *Predota v. Austria*, in which it stated that the applicant's dismissal was necessary in democratic society because the applicant used strong language to criticize the provided services and performance of his employer.[64] As the ECtHR further added, the applicant discussed issues, which were not within the interest of the general public.[65] It appears that the way that the individual expresses criticism can be decisive. In *Predota*, the applicant had infringed 'the Disciplinary Regulations of the Railways' by

[58] Ibid.
[59] Ibid, paras.107-110.
[60] Ibid.
[61] Harris D., O'Boyle M., Bates E. and Buckley C., *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009), p.443.
[62] *Fuentes Bobo v. Spain* App no 39293/98 (ECtHR, 29 February 2000).
[63] Ibid.
[64] *Predota v. Austria* App no 28962/95 (ECtHR, 18 January 2000), para.4.
[65] Ibid.

distributing leaflets, which criticized the nature of his job.[66] The Vienna Labour Court, before which the applicant lodged a claim, characterized this behaviour as breach of professional duty of loyalty by 'disseminating the company's internal matters to the public'.[67] The Court of Appeal and the Supreme Court further rejected applicant's appeals and confirmed the Labour Court's decision.[68] This shows that there are cases, as the ECtHR showed, in which there is breach of professional duty of loyalty, which could justify the termination of employment under the ESC/RSC (article 1) and also ILO Convention N.158. To explain, article 4 of ILO Convention N.158 refers to 'conduct of worker', which constitute a valid reason of termination of employment. In addition, article 1 ESC/RSC, as interpreted by the ECSR in the Concluding Observation to Spain, integrated the reasons for dismissal identified by the ILO as valid in the context of the ESC/RSC.[69]

IV. Article 11 ECHR: freedom of association

The ECtHR recognized that the employer has the right to restrict freedom of association of employees under article 11 ECHR, when it is necessary in a democratic society.[70] The State has a positive obligation to promote freedom of association, which includes the right to become or not become a member of a trade union.[71] Political parties constitute part of a democratic society, which means it is important to safeguard individuals against unfair dismissal based on their political opinion or affiliation.[72] In this context, the State might be obliged to intervene in the relationships between private parties to ensure the individual's freedom of association. In *Redfearn v. UK*, the applicant was dismissed from Serco, after he was elected as a local councillor for the British National Party (BNP), which only accepted white nationals as members of the Party.[73] The applicant brought a claim for indirect racial discrimination before the Employment Tribunal, which held that the employer's decision for dismissal was proportionate and legitimate for reasons related to health and safety (e.g. his position could lead to attacks on Serco's transport vehicles).[74] The ECtHR accepted that the employer may lawfully restrict the employee's freedom of association in cases that is deemed as necessary in

[66] Ibid, Part A.
[67] Ibid.
[68] Ibid.
[69] ECSR, 'Conclusions XIV-2, Spain', p.684.
[70] *Redfearn v. UK* App no 47335/06 (ECtHR, 26 November 2012), para.44.
[71] *Wilson, National Union of Journalists and others v. UK* App nos 30668/96, 30671/96 and 30678/96 (ECtHR, 2 October 2002).
[72] *Vogt v. Germany* App no 17851/91 (ECtHR, 2 September 1996).
[73] *Redfearn v. UK* (n.70); *Stedman v. the United Kingdom* App no 29107/95 (ECtHR, 9 April 1997).
[74] Ibid (Redfearn), para.13.

a democratic society.[75] In the present case, the employer had only received complaints against the applicant about his political affiliation.[76] The employer did not receive any complaint from a client or a colleague about the employee's conduct or performance at workplace.[77] It is interesting that in the present case, the applicant was not eligible to bring to claim before the Employment Tribunal, because the applicant did not fulfil the required admissibility criterion, which required him to complete one qualifying year in employment.[78] This threshold, as the ECtHR explained, was set by the UK Government in the interests of employers' flexibility.[79]

The *Redfearn* case seems to be a landmark decision in terms of employment and job security. From a human rights perspective, it seems that the ECtHR takes into consideration various factors to determine whether a dismissal, which restricts individual's freedom of association, could be understood as a necessary measure 'in a democratic society'. Nevertheless, the ECtHR provides substantive safeguards for workers that were dismissed, who were otherwise (due to procedural requirements) not allowed to bring a claim for unfair dismissal before the national competent courts.[80] The ECtHR's approach is closer to the ILO's clear-cut approach rather than to the EU approach, as the ECtHR provides substantial safeguards for protection of freedom of association, which could promote human dignity and equality. The ILO's rights-based approach is reflected in article 5(a) of ILO Convention N.158, which explicitly prohibits dismissals on grounds related to 'union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours'.[81] Whereas, the EU does not regulate individual dismissals for reasons related to political affiliation or freedom of assembly. The EUCFR provides prohibition against unfair or unlawful dismissal (article 30 EUCFR), which is arguably manifested in EU Directives protecting employees from discriminatory dismissals. However, trade union membership and collective bargaining are not within EU competence or protected under EU law as a protected ground for dismissal.

[75] Ibid, para.44.
[76] Ibid, para.45.
[77] Ibid, para.33.
[78] Ibid, para.53.
[79] Ibid.
[80] *Stedman* (n.73).
[81] ILO Convention N.158, article 5(a).

4.2.2 European Social Charter (ESC) and European Social Charter Revised (RSC)

The European Social Charter (ESC), which was revised in 1996 (the European Social Charter Revised) (RSC), clearly enshrines the right of workers to protection against unfair or unlawful dismissal. The European Committee of Social Rights (ECSR) has endorsed a broad understanding of the term 'termination of employment', which includes *inter alia* termination due to bankruptcy and invalidity.[82] The ESC adopted a list of valid reasons in case of termination of employment, which are the same with ILO Convention N.158 - i.e. capacity, conduct or based on the operational requirements of the undertaking, establishment or service.[83] The ESC's provisions, which were also embedded in the RSC, enshrines invalid grounds of dismissal that include: maternity reasons that also entail the right to return to the same or similar post (article 8(2) ESC and RSC), the right to join a trade union (article 5 ESC and RSC) and the right to strike (article 6(4) ESC and RSC).

As Colm O'Cinneide articulated, the right to work (in article 1 ESC/RSC) has a more detailed normative content from article 6 ICESCR, as it is focused on 'availability' and 'accessibility'.[84] The ECSR shows through its interpretative approach that this right, as a composite right, has many components, such as the right to protection against unfair dismissal (job security). In particular, the ECSR has stated that this right entails prohibition against any direct or indirect discrimination in employment based on different grounds, which *inter alia* include sex, race, ethnic origin, religion, disability, age, sexual orientation and political opinion.[85] Article 1 ESC/RSC provides positive obligations on States to promote full employment in its national framework, which according to O'Cinneide, entail two types of obligations: first, measures to enable workers to preserve their employment and second, measures to facilitate jobseekers to transition from unemployment to employment.[86]

In the second paragraph, the ESC and the RSC enshrine the right of worker to earn his living in an occupation freely entered upon (article 1(2) ESC/RSC). According to the interpretative approach of the ECSR, article 1(2) ESC/RSC includes different types of work-related protection, among which the prohibition of all forms of discrimination in employment.[87] In this context, the ECSR has stated that the State shall take specific measures to ensure that the

[82] ECSR, 'Conclusions XIV-2, Spain', p.684.
[83] RSC, article 24.
[84] Mantouvalou (n.29), p.120.
[85] ECSR 'Conclusions XVI-1, Austria', p.25.
[86] Mantouvalou (n.29), p.114.
[87] ECSR, 'Conclusions II, Statement of Interpretation on Article 1(2)', p.4.

right under article 1(2)ESC/RSC is protected, such as protection against unfair dismissal and remedies.[88] As the ECSR has further explained, when a dismissal causes detrimental effects to the individual, such termination, can also fall in the ambit of article 1(2) ESC/RSC.[89] The RSC also includes the following grounds in the list of prohibited grounds of discrimination, which are inherently linked with other provisions under the Charter: family responsibilities (article 27 RSC), disability (article 15 RSC), sex (article 20 RSC) and acting in the capacity of a workers' representative (article 28 RSC). Article 28 RSC also guarantees the right of workers' representatives to protection in the undertaking and facilities to be accorded to them. According to the ECSR, article 28 RSC also entails protection against unlawful or unfair dismissal based on the capacity and the activities of workers' representative.[90]

The ECSR has examined a limited number of complaints concerning article 24 RSC, which provides the right to protection in cases of termination of employment, through the Collective Complaints Procedure (CCP). In *Finnish Society of Social Rights v. Finland*, the Committee held that national courts shall examine whether the dismissal could be justified due to operational requirements of the undertaking, establishment or service.[91] According to the Finnish Employment Contacts Act, termination of employment is justified in cases where 'the work to be offered has diminished substantially and permanently for economic or production-related reasons or for reasons arising from reorganisation of the employer's operations'.[92] The Finnish Society of Social Rights, as the complainant organization, noted that 'economic reasons' that constitute a valid reason for termination of employment, refer 'to economic difficulties, not to maximize profit'.[93] The ECSR noted that the term of 'operational requirements' could cover different situations, such as measures to increase enterprise's competitiveness level even in cases where the enterprise does not face any economic difficulty.[94] The ECSR concluded that Finish legislation strikes a fair balance between employees' and employers' rights, which is entailed in article 24 RSC.[95] It further set out three conditions, which shall be met to justify the dismissal on economic grounds. There shall be a

[88] ECSR, 'Conclusions XVI-Iceland', p.313.
[89] ECSR Conclusions XVI-1, Austria, p.25.
[90] ECSR, 'Conclusions 2003, France', pp.208-209.
[91] *Finnish Society of Social Rights v. Finland* (Complaint N.107/2014), para.49.
[92] Ibid.
[93] Ibid.
[94] Ibid, para.50.
[95] Ibid.

'decline in demand', 'obsolete products' and 'an increased competition or restructuring of the business'.[96]

In addition, article 4(4) ESC/RSC enshrines 'the right to a reasonable period of notice for termination of employment', which could act either as safeguard for job security or impediment for facilitating transitions of employment. In *Greek General Confederation of Labour (GSEE) v. Greece Complaint N.111/2014*, the complainant organization alleged that the notice period as derived from domestic legislation, which was adopted between 2010 and 2014 as part of economic (austerity) measures, was too short.[97] According to Sub-section A in article 74(2) of Act N. 3863/2010, full-time employees that have not completed the first twelve months of employment, can be dismissed without prior notice.[98] Whereas Section B of the Act N.2863/2010 provided that those who worked for a period of twelve months to two years are entitled to one-month' notice prior to termination of employment.[99] The Committee concluded that there was a breach of the Charter, because of the 'legislature's inaction' and the 'strong pressure from the creditor institutions' that led to the breach of Charter's provisions.[100] As the term 'reasonable period of notice' is not defined, the ECSR looks at the qualified period of employment. For example, granting one week notice prior to dismissal for a worker who was employed less than six months has been deemed a reasonable period.[101] In an effort to adjust a strict procedural requirement, the Committee also suggested that the worker should be granted time off to enable the worker to find another job and remain in the labour market.[102]

Looking at the case of Cyprus in 2012, the ECSR concluded that the domestic legislation in Cyprus is not in conformity with the Charter on two grounds.[103] First, the employees that are not continuously employed for twenty-six weeks are excluded from the scope of protection.[104] This could increase the levels of job insecurity for workers that have not completed a period of continuous employment for twenty-six weeks. Second, the categories of workers that are excluded from the scope of protection are more than those prescribed in the Appendix to the Charter.[105]

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[96] Ibid.
[97] *Greek General Confederation of Labour (GSEE) v. Greece Complaint* (Complaint N.111/2014).
[98] Greek Legislation, sub-section A in article 74(2) of Act N.3863/2010.
[99] Greek Legislation, section B of the Act No.2863/2010.
[100] GSEE Complaint N.111/2014 (n.97), paras.249-250.
[101] ECSR, 'Conclusions XIII-3, Portugal', p.267.
[102] ECSR, 'Conclusions XIII-1, Greece', p.124; ECSR 'Conclusions XIII-3, Greece', p.220.
[103] ECSR, 'Conclusion 2012 Cyprus'.
[104] Ibid.
[105] Ibid.

It is interesting that issues related to decent work are conceived as part of other ESC rights - such as, the right to just conditions of work (article 2 ESC/RSC).[106] Whereas, the CESCR tightly connected the two ingredients of 'accessibility and availability' with decent work (which also appears as 'acceptability of work').[107] The CESCR General Comment N.18 (2005) explicitly states that the right to work is 'essential for realizing other human rights and forms an inseparable and inherent part of human dignity'.[108] In this context, the CESCR identified the three elements (accessibility, availability and acceptability), which characterized as 'interdependent and essential elements' for transnational regulation.[109] This shows that the ECSR and CESCR converge as to the first two elements and diverge towards the normative content of the right to work, which has a 'complex character'.[110]

4.3 Social security in the human rights regime

4.3.1 European Convention on Human Rights (ECHR)

The right to social security as a socio-economic right is not clearly guaranteed in the ECHR. However, the ECtHR has regarded social security benefits as 'possessions' under article 1 Protocol 1 to ECHR (A1P1 ECHR) where the individual contributed to a fund created by the State for purposes of pensions or other allowances. As the ECtHR stated in *Nagy v. Hungary* to emphasize the vital need for adequate social security protection: 'in the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social-security and welfare benefits'.[111] This aspect of the ECHR is the focus of the first part of this section of the chapter. The second part will explore social security standards in relation to non-discrimination law and the right to private and family life (article 8 ECHR) as developed in the ECtHR's jurisprudence. The third part examines the right to fair trial (article 6), which entails social security disputes.

[106] Mantouvalou (n.29), pp.120-121.
[107] Ibid.
[108] CESCR General Comment N.18.
[109] Ibid.
[110] Mantouvalou (n.29), pp.125.
[111] *Nagy v. Hungary* App no 56665/09 (ECtHR, 14 September 2017), para.80.

I. A1P1 ECHR

A1P1 ECHR provides that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions'.[112] In *Maurice v. France*, the ECtHR described 'possessions' as 'existing possessions or assets'.[113] As the ECtHR explained, social security legislation, which integrates the situations where there is 'a legitimate expectation of obtaining an asset',[114] generates a proprietary interest that falls in the scope of the ECHR.[115] In *Béláné Nagy v. Hungary*, the ECtHR referred to the term 'legitimate expectation', whose interpretation shall be 'based on a legal provision or a legal act',[116] and examined whether there was 'an assertable right under domestic law to a welfare benefit'.[117]

The ECtHR developed a two-fold test for A1P1 ECHR in *Béláné Nagy*. First, there shall be an assertable right and second, the right shall be of a sufficiently established, substantive proprietary interest under the national law expectation.[118] In *Baczúr v. Hungary*, the ECtHR held that applicant's claim for disability benefit for six months satisfied the test,[119] whereas, the applicant in *Béláné Nagy* had not, according to the new work capability assessment methodology that was introduced in Hungary.[120] This illustrates the subjective nature of the assessment criteria, which determine whether an individual is eligible to receive the disability benefit or not.

Social security benefits fall in the ambit of 'possessions' under A1P1 ECHR, however, the wide margin of appreciation left to the States could substantially restrict the right to social security. In *Aldeguer Tomás v. Spain*, the ECtHR clarified that the State has a wide margin of appreciation under the ECHR as to 'general economic or social measures, which are closely linked to the State's financial resources'.[121] The ECtHR explained that national authorities are aware of the special needs of the internal domestic system.[122] In other words, the State is in a better position to understand the societal needs than the international standard-setting actors (such as the ECtHR) and for this purpose, the domestic authorities have a wide margin of

[112] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950) ETS 5, article 1, Protocol No.1.
[113] *Maurice v. France* [GC], App no 11810/03 (ECtHR, 6 October 2005), para. 63.
[114] *Stummer v. Austria* [GC], App no 37452/02 (ECtHR, 7 July 2011), para.82.
[115] *Stec and Others v. United Kingdom* App nos 65731/01 and 65900/01 (ECtHR, 12 April 2006), para.54.
[116] *Béláné Nagy v. Hungary* (n.111), para.75.
[117] *Stec and Others v. the United Kingdom* (n.115), dec., para.51.
[118] *Nagy v. Hungary* (n.111), para.79.
[119] *Baczúr v. Hungary* App no 8263/15 (ECtHR, 7 March 2017), para.24.
[120] *Nagy v. Hungary* (n.111), para.10.
[121] *Aldeguer Tomás v. Spain*, App no 35214/09 (ECtHR, 14 June 2016), para.82.
[122] Ibid.

appreciation, which will enable them to introduce the appropriate domestic legislative amendments.[123] The Member States are eligible to amend social security legislation, which will be adapted to the current societal needs (e.g. eligibility criteria).[124] As the ECtHR further explained, social security legislation is expected to be amended 'to verify the existence of a sufficiently established, substantive proprietary interest under the national law' and subsequently, promote legal certainty and the rule of law.[125] It seems that this approach endorses the principle of effectiveness, as it permits the Member States to have discretion and adopt their own legislation.

II. Articles 8 and 14 ECHR

The restriction of a wide margin of appreciation could only be removed if the State's interference falls in the ambit of non-discrimination law (article 14 ECHR). In *Konstantin Markin v. Russia*, the ECtHR held that article 8 ECHR does not include the positive obligation to provide parental leave allowances.[126] However, the State shall decide whether to provide parental leave and parental allowances, in such a way that will be in conformity with articles 8 and 14 ECHR.

As the ECtHR stated: 'enabling one of the parents to stay at home to look after the children, parental leave and related allowances promote family life and necessarily affect the way in which it is organised'.[127] In the present case, the applicant, who was employed in military personnel, requested three years' parental leave because he was the sole carer for his children.[128] After his claim was rejected because such allowances were only granted to female personnel, the applicant brought a case before the Military Court, which rejected the applicants' claims.[129] Then, the applicant was granted a parental leave allowance by another head of the military unit.[130] As consequence, the Military Court reacted, characterizing this decision as unlawful.[131] The ECtHR based its judgment on a wide range of international materials, which promote gender equality: CEDAW, ILO Convention N.111, EUCFR and EU Parental Leave Directive 2010/18. As the ECtHR stated, national law shall not impose traditions (such as

[123] Ibid.
[124] *Nagy v. Hungary* (n.111), para.88.
[125] Ibid, para.89.
[126] *Konstantin Markin v. Russia* App no 30078/06 (ECtHR, 22 March 2012), paras.98-101.
[127] Ibid, para.130.
[128] Ibid, para.117.
[129] Ibid, para.16.
[130] Ibid, para.31.
[131] Ibid.

man's primordial role and patriarchal family) to justify a difference in treatment in grounds of sex.[132] This is a landmark case because it shows that the ECtHR changed its view from the 1988 judgment of *Petrovic v. Austria* which had previously stated that the exclusion of male applicants from Parental Leave Law was not a violation of articles 8 and 14 ECHR.[133]

III. Article 6 ECHR

Article 6 ECHR states that 'in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal'.[134] The ECtHR clarified that disputes concerning social benefits could be conceived as 'civil rights and obligations'.[135] In *Feldbrugge v. the Netherlands*, the applicant claimed that she was not able to return to work as she was ill.[136] In March 1978, the Governing Board of the Occupational Association of the Banking and Insurance, Wholesale Trade and Self-Employment Sector held that she was no longer entitled to sickness benefit as the Associate's consulting doctor decided that she was able to return to work.[137] The applicant lodged an appeal, claiming that her right to a fair trial was infringed.[138] The Appeals Board declared her application as inadmissible because two permanent medical experts examined the applicant and allowed her to express her objections orally.[139] The ECtHR discussed the features of public law (i.e. character of legislation, compulsory nature of the insurance and assumption by the State of responsibility for social protection) and private law (i.e. personal and economic nature of the asserted right, connection with the contract of employment, affinities with insurance under the ordinary law) to examine whether the legislation in dispute could fall in the scope of public law.[140] In this case, the ECtHR decided that the legislation in dispute, which established the legal framework of the health insurance scheme, could fall in the scope of article 6 ECHR. As the ECtHR explained, there was a breach of article 6(1) ECHR because the applicant did not fulfil the 'restrictive' conditions of access to the two Boards, and as a consequence the applicant was restricted from bringing a claim before the two Boards and challenge the decision, which was taken by the President of the Appeals Board.[141]

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[132] Ibid, para.127.
[133] Ibid, paras.35-43; *Petrovic v. Austria* App no 20458/92 (ECtHR, 27 March 1998).
[134] ECHR, article 6.
[135] *Feldbrugge v Netherlands* App no 8562/79 (ECtHR, 29 May 1986).
[136] Ibid, paras.11-14.
[137] Ibid, para.11.
[138] Ibid, para.12.
[139] Ibid.
[140] Ibid, paras.31-35 (public law) and paras.36-39 (private law), para.40 (conclusion).
[141] Ibid, paras.45-47.

The ECtHR further decided that proceedings concerning welfare benefits given on a non-contributory basis could also fall in the scope of article 6(1) of ECHR.[142] This was established in *Stec v. UK*, and re-confirmed in more recent cases (such as in *Carson*).[143] The ECtHR particularly stated that claims regarding payment of a welfare benefit or pension (contributory or non-contributory), which generates 'a proprietary interest', falls under the scope of A1P1 ECHR.[144]

4.3.2 European Social Charter (ESC/RSC) and the European Code of Social Security (ECSS)

The right to social security is clearly enshrined in article 12 of ESC/RSC, according to which States shall 'maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of ILO Convention N.102 (as set in the ESC) and the European Code of Social Security (ECSS) (as set in the RSC)', which provides minimum standards for social security protection as established in ILO Convention N.102.[145] The ESC and RSC, which endorsed the branches of social security benefit in the ECSS, adopted social security standards for *inter alia*: medical care, unemployment, sickness, employment injury, family responsibilities and maternity reasons.

Family responsibilities

Part VII of the ECSS, which was not accepted by the Republic of Cyprus, established protection for family benefit. According to article 40 ECSS, the family benefit solely covers 'the maintenance of children'.[146] In other words, the family benefit does not cover situations where the worker acts as carer of his relatives (e.g. elderly parents). The family benefit shall be provided to individuals that have completed a qualifying period, which consists of one month of contribution/employment or six months of residence.[147]

Maternity leave

Maternity benefit covers contingencies of pregnancy, confinement and its consequences, which is a standard derived from that adopted in ILO Convention N.183.[148] According to article 48(2)

[142] *Salesi v Italy* App no 13023/87 (ECtHR, 26 February 1993).
[143] *Stec* (n.115), para.49; *Carson and others v. UK* App no 42184/05 (ECtHR, 16 March 2010), para.63.
[144] *Stec* (n.115), para.39.
[145] ESC, article 12(2); RSC, article 12(2).
[146] European Code of Social Security (Revised) (6 November 1990) ETS N.139 (ECSS), article 40.
[147] Ibid, article 43.
[148] Ibid, article 48.

of the Code, the maternity benefit shall cover pre-natal, confinement and post-natal care and hospitalization. The Code stipulates that the aim of maternity benefit is to 'maintain, restore or improve the health of the woman protected and her ability to work and to attend to her personal needs', which creates responsibilities for the employer to adjust worker's needs to the enterprise's interests.[149]

Unemployment benefit

Article 12 RSC increased the scope of protection and sets the conditions according to which an individual is entitled to unemployment benefits. The term 'suitable work', which also appears in ILO Convention N.102, is not explicitly defined in the Charter. The ECSR interpreted the term 'suitable job', which means that it 'must be adequately paid, must correspond to the physical abilities of the person concerned and it must not constitute a hazard to the unemployed person's health or moral principles'.[150] Whereas, the ECSS specifies that unemployment benefit should be provided in cases where the individual is 'unable to obtain suitable employment in the case of a person protected who is capable of, and available for, work'.[151]

In the 2016 ECSR Conclusion (Spain), the ECSR discussed Spanish legislation, which states that the individual shall 'be actively seeking a job and not have rejected the offer of a suitable job or refused to take part, without justified reason, in an occupational improvement, training or retraining programme'.[152] As the ECSR suggested, in cases where the unemployment benefit is suspended or withdrawn because an individual rejected the offer of a suitable job, then the State shall ensure that the individual will be able to bring a claim before the national courts, which will provide him or her judicial redress if the job was not suitable.[153] Reflecting on the UK legislation, the ECSR agreed that the period to decide on the suitability of a job is decided *ad hoc*.[154] This means even if the prescribed period (13 week initial period) has passed, it does not mean that the individual lost his or her right to claim that the job is not suitable.[155] In this context, the CoE published a 'Guide to the concept of suitable employment in the context of unemployment benefits', as a soft-law handbook, to influence transnational regulation,

[149] Ibid, article 48(3).
[150] ECSR 'Conclusions XIV-1 Austria, 1994-1996, article 1(2), p.70.
[151] ECSS, article 20.
[152] ECSR, 'Conclusions Spain 2016', p.139.
[153] Ibid, pp.139-140.
[154] ECSR, 'Conclusions UK 2016', p.203.
[155] Ibid.

which appears that it was also used by the CESCR.[156] At the ILO-level, the CEACR through its interpretative approach, discussed different elements (such as travel time and distance), which could render a job position as suitable. However, it appears that there is no clear-cut definition of 'suitable job' and Member States enjoy a wide margin of appreciation at international level (ILO/UN) and in the context of the CoE.

Educational benefit

Educational benefit, which could be used to increase employability of individuals that will enable them to enter, re-enter or remain in the labour market, is not included in the ECSS and the Convention on Social Security (CSS). The ECHR enshrined the right to education in article 2 of Protocol 1 to the ECHR, although the ECtHR has not found that this provision encompasses the right to vocational training. It seems that the right to education as enshrined in the ECHR refers to the right to substantive education. The idea of educational benefits is to enable the individual to make the transition from one job to another or from unemployment to employment. For this purpose, it is important to explore the regional standards concerning educational benefits.

Article 1(1) RSC provided that the right to work encompassed the duty of the Member States to provide or promote appropriate vocational guidance and training. In addition to the above, article 10 RSC enshrines the right to vocational training. This provision refers to 'technical and vocational training for all persons', which means it refers to all individuals (either workers or unemployed individuals).[157] Article 10 RSC refers to the State's duty to provide 'readily available services'.[158] Also, it seems that it creates a flexible framework where individuals would be able to enjoy the right to vocational training. This flexible framework entails financial assistance of the ALMPs and normal working hours that support the realization of training. Article 1(4) RSC provides that the Member States are obliged to provide or promote appropriate vocational guidance, training and rehabilitation.[159] The ECSR expressed that vocational training programmes shall be addressed to both employed and unemployed individuals.[160]

[156] Council of Europe, *Guide to the concept of suitable employment in the context of unemployment benefits* (Council of Europe 2010).
[157] RSC, article 10(1).
[158] Ibid, article 10.
[159] Ibid, article 1(4).
[160] ECSR, 'Conclusions XII-1, Statement of Interpretation on Article 1(4)', p.67.

It appears that the Code has not set out any rules concerning financial assistance in the context of ALMPs and LLL. For example, it has not specified which actors shall be responsible to provide financial assistance for the realization of vocational training. In addition to this, the Charter refers to supervision of vocational programmes, however, it has not specified which actors shall act as supervisory mechanisms and to what extent this supervision would enable the individuals to remain in the labour market.[161] It seems that the ILO has adopted a more detailed normative framework as to which actors shall invest and contribute in the realization of ALMPs and LLL. In particular, the States are responsible for in-work training (ILO Convention N.142),[162] whereas all interested actors (including enterprises, States) shall invest to ensure that everyone enjoys the right to education and training (ILO Recommendation N.195).[163]

The role of social dialogue is relevant because the supervision of these facilities and programmes shall be decided in consultation with workers' and employers' representatives.[164] Social dialogue, which is recognized as one of the main ingredients in the flexicurity discourse, was also set as a core feature in the CoE regime. The ESC and RSC enshrined the right to social dialogue in their scope of protection – i.e. article 5 ESC/RSC, article 6 ESC/RSC, article 25 RSC and article 28 RSC. Cyprus, which is used as case study in this thesis, accepted articles 5 and 6 ESC/RSC.[165] Article 5 ESC and RSC enshrines the Member States' obligation to guarantee the freedom of workers and employers to form and join organizations (such as trade unions), through which they will be able to protect their socio-economic rights.[166] However, it does not seem an easy task to strike a proper balance between the socio-economic interests of workers and enterprises' interest to increase their level of competitiveness. Moreover, article 6 ESC and RSC safeguards the right to collective bargaining, which may take the form of 'joint consultation'. The ECSR described 'joint consultation' as 'consultation between employees and employers or the organisations that represent them'.[167] Such consultations shall be held as tripartite bodies, where social actors shall participate in the whole negotiating process.[168] The

[161] RSC, article 10(5).
[162] ILO Convention on Human Resources Development, 1975 (N.142), article 4.
[163] ILO Recommendation on Human Resources Development, 2004 (N.195).
[164] RSC, article 10(5).
[165] Council of Europe, official website <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/declarations?p_auth=ecSUAdY7&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=CYP&_coeconventions_WAR_coeconventionsportlet_codeNature=10> accessed 15 April 2019.
[166] RSC, article 5; ESC, article 5.
[167] ECSR, 'Conclusions I, Statement of Interpretation on Article 6§1', pp.34-35.
[168] ECSR, 'Conclusions V, Statement of Interpretation on Article 6§1', p.41.

issues raised for discussion shall cover all matters of common interest, such as vocational training, productivity and social insurance.[169] The representatives shall fulfil particular criteria that are prescribed by domestic law, although these criteria shall be 'objective, reasonable and subject to judicial review'.[170]

According to article 21 RSC, social dialogue also takes the form of exchanging information. It seems that this type of social dialogue aims to facilitate the procedural and normative function of enterprises, while enabling communication. In other words, it enables the worker to be aware of the situation in the undertaking/enterprise. In addition, article 22 RSC, which provides 'the right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking', introduces the right of workers' representatives to consultation at enterprise-level.

Article 25 RSC provides that workers have the right to protect their claims in case of insolvency which might arise from employment relationship (including their employment contract). This provision seems particularly important in the era of economic crisis, where the situation of workers is manifestly affected by the economic downturn. Similarly, the ESC enshrines the right to social dialogue, which includes *inter alia* information and consultation with workers' representatives, in case of collective redundancy.[171] Article 29 RSC explains that the social dialogue in these circumstances shall aim to 'avoid or limit collective redundancies or mitigate their consequences'. In this context, the RSC sets out different social measures that should be taken into account as a means to avoid collective redundancies, among which are the ALMPs and LLL ('redeployment or retraining programmes).[172] As the ECSR indicated, article 1(3) RSC, which provides that the Member States shall 'establish or maintain free employment services for all workers', entails that trade unions and employers' organisations shall participate in the organization and development of employment services.[173]

[169] ECSR, 'Conclusions I, Statement of Interpretation on Article 6§1', pp.34-35.
[170] ECSR, 'Conclusions 2006, Albania', p.39.
[171] RSC, article 29.
[172] Ibid.
[173] ECSR, 'Conclusions XV-1, Addendum, Poland', p.143.

4.4 Conclusion

As an overall conclusion, it seems that the CoE is more concerned about human rights and less concerned with dismissals. It is interesting that the evolving jurisprudence of the ECtHR does cover dismissals to the extent that fall under the scope of other substantive rights (art.8-11 ECHR), but does not seem to attend to the right to access employment (or recruitment), which is a core component of employment security from a flexicurity perspective. The concept of employment security, which in this research study takes the meaning of entering, remaining or re-entering employment, is complex in its very nature (see more about employment security as flexicurity component in section 2.2) and sometimes collides with job security standards, which could be challenged under the ECHR spectrum. As illustrated in section 4.2, the ECtHR strikes a balance between other ECHR substantive rights and collective interests (e.g. public health) in a case-by-case basis to determine whether the dismissal was legitimate and necessary in a democratic society.

Hugh Collins argued that the right to work is so crucial, however, there is hesitation over its recognition as human right due to its 'imprecise meaning'.[174] It is inevitable that the right to work is conceived as a fundamental human right at international level, which is also established at domestic level under the Constitution of Cyprus (article 6). However, as Collins explained, there is a 'lack of consensus' about the normative content of the right to work, which has multiple integral substantive components, such as the right to decent work (as promoted at UN/ILO level) and the right to access employment.[175] The ESC/RSC attempts to distinguish the different components of the right to work, which also seems problematic because the Member States are eligible to select and adopt discrete provisions. This practice of selecting the integral parts of the right to work could create major challenges as to the normative content of the right to work, which as an 'hybrid' right entails a mixture of civil and socio-economic liberties (the hybrid nature of the right to work is explained in section 4.2.1).

The right to work, which seeks to 'attain full employment' in the ESC/RSC context, reflects the positive aspect of the right to work, in which (according to Collins) 'positive rights [are] typically framed as goals'.[176] This positive feature of the right to work also appears in the international arena: article 6 of ICESCR refers to 'full and productive employment' and ILO

[174] Collins H., 'Is there a Human Right to Work' in Mantouvalou V. (ed.) *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2017), pp.20-21.
[175] Ibid.
[176] Ibid, p.21.

Declaration of Philadelphia 1944 takes the form of 'full employment'.[177] It is interesting that the EUCFR of 2000 does not make any mention of full employment and limits the scope of the right to the freedom to choose or accept occupation or conduct one's own business in the EU regime (articles 15 and 16 EUCFR), which is established in article 1(2) ESC/RSC. This provision of ESC/RSC protects the freedom of individual to get access to work without being discriminated. Even if transnational labour systems converge because they mutually promote equality and fundamental rights as core values in their system, it seems that neither the UN/ILO nor the CoE are seriously interested in regulating the procedures of economic dismissals. Whereas, as we see below the EU provides not only for protection from discriminatory dismissal and social security provision, but also offers detailed standards for economic dismissals to preserve jobs, which inevitably is a component of the multi-dimensional right to work (see section 5.3 for economic dismissals at EU-level).

Nevertheless, the protection of the right to social security under A1P1 ECHR seems to be an important development in the context of ECHR, which could facilitate the realization of employment security as part of the right to work. The right to social security, which includes non-contributory and contributory benefits, is not distinguished into branches or contingencies as in ILO Convention N.102. The ECSS follows the logic of ILO Convention N.102, but it takes it a step further and includes educational benefit in its normative content, which could play a key role in the realization of vocational education and training (ALMPs and LLL) at national level. The ECtHR developed its distinctive two-fold test in *Nagy* (i.e. assertable right and substantive proprietary interest),[178] to restrict the scope of the right to social security. It seems that the right to social security can be substantially restricted due to the wide margin of appreciation given to Member States under the ECHR, which aims to preserve pluralistic democracies and State sovereignty, as illustrated in *Konstantin Markin*.[179] It seems that the way that social security is comprehended in each systemic environment, illustrates that transnational labour regulatory systems develop its own norms to attain distinct aims. The ECHR and the ESC/RSC conceptualize social security and social assistance as a human right.

The arguments that are deployed in this chapter emphasize that the legal right to work and social security, as exists in different systemic environments, differ as to their normative content and comprehensible form. From the ECHR perspective, it seems that there is more to be done

[177] ICESCR, article 6; Declaration of Philadelphia 1944.
[178] *Nagy v. Hungary* (n.111).
[179] *Konstantin Markin v. Russia* (n.126).

to respect, protect and fulfil the legal right to (decent) work, which is fiercely promoted at UN/ILO level, and to endorse the UN maxim: 'all human rights are universal, indivisible, interdependent and interrelated'.[180]

[180] Baderin M. and McCorquodale R., *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007), p.6.

Chapter 5: The European Union

5.1 Introduction

Following the analysis of the systems of UN/ILO and the CoE, this is the last chapter on transnational legal systems. This chapter examines the regulation of the European Union (EU). The aim of this chapter is to see how the EU deals with employment security and job security, and gain an understanding of the connections between employment security and social security regulation.

The EU consists of a single internal market, which seeks to guarantee free movement of people, goods, services and capital.[1] Phil Syrpis observed that 'for the framers of the Treaty [of Rome], it was seen as axiomatic that through the establishment of a common market, social and economic benefits would result'.[2] However, since there are different domestic labour traditions, labour mobility could give rise to a potential conflict of national laws. Nevertheless, the Ohlin Report (1956), which was prepared by a group of ILO experts and formed the basis for the Treaty of Rome (1958), clarified that creating a common market does not presuppose harmonisation of labour standards.[3] The sole exception initially contemplated was equal pay,[4] which then spawned the evolution of much more wide-ranging non-discrimination law, that has implications for employment security and social security.

EU non-discrimination law has become more inclusive after the Treaty of Amsterdam (1997) as the Race Directive 2000/43 and Framework Directive 2000/78 introduced multiple non-discriminatory grounds (such as race, ethnicity, sexual orientation, religion or belief, age and disability).[5] It seems that EU non-discrimination law needs to be set in the context of substantive equality. This entails a shift from formal Aristotelian equality to the 'multidimensional'[6] and complex concept of substantive equality. The Aristotelian formal equality, whose roots are set in *Ethicae Nicomachiae*, appears as 'like things alike and unlike

[1] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU), article 3.
[2] Phil Syrpis, 'The EU's role in Labour Law' in Alan Bogg, Cathryn Costello and A.C.L. Davies (eds), Research Handbook on European Labour Law (Edward Elgar Publishing Limited, 2016), p.23.
[3] International Labour Organisation, Social Aspects of European Economic Co-operation. Report by a Group of Experts (summary), in: (1956) 74 *International Labour Review*, pp.99-123.
[4] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), article 157.
[5] Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts [1997] OJ C340/1; TEC, article 13(1); TFEU, article 19(1).
[6] Fredman S., 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) *Human Rights Law Review* 1, pp.9-11.

things differently, according to their difference'.[7] As Jule Mulder argued, the concepts of 'likeness' and 'unlikeness' are neither defined nor explained in the work of Aristotle.[8] Whereas, substantive equality looks at the 'outcomes' and does not only seek to 'remove [any] irrelevant classifications, such as race or sex', which is the aim of formal equality.[9] Instead, as Sandra Fredman explained, substantive equality is 'a multidimensional concept' because it pursues 'four complementary and interrelated objectives': first, it aims to 'redress disadvantage'; second, 'address stigma, stereotyping, prejudice and violence'; third, 'facilitate participation'; and fourth, 'accommodate difference'.[10]

The notion of substantive equality, which is inter-related with the principle of human dignity (article 2 TEU),[11] could be linked to the so-called 'social dimension' of the EU. The Treaty of Lisbon (2009), which revisited the EU aims, proclaimed that sustainable development in the EU internal market entails realization of 'full employment and social progress'.[12] Of course, the 'social dimension' is not a new development *per se*. In the Summit of Paris (1970s), the Heads of Governments agreed that they 'attached as much importance to vigorous action in the social fields as to the achievement of the Economic and Monetary Union'.[13] This led to the adoption of the first Social Action Programs in January 1974, which set three core objectives, among which was to 'promote and provide for a full and better employment [in the EU]' and improve the standards of living.[14] Under this prism, multiple *acquis* were adopted often with a market-rationale, which set a unified legal framework to regulate *inter alia* economic dismissals (Collective Redundancies Directive 75/129, Insolvency Directive 80/897, Transfer of Undertakings Directive 77/187) and social security coordination (Regulations 3 and 4 of 1956). During the EC Presidency of Jacques Delors, the Community Charter of the Fundamental Social Rights of Workers of 1989, which was purely declaratory, introduced core principles that set the foundations for the European labour law.[15] These principles included

[7] Aristotle, *Ethica Nichomacea* V.3 1131a–b (W Ross trans, 1925).
[8] Jule Mulder, *EU Non-Discrimination in the Courts: Approaches to Sex and Sexualities Discrimination in EU Law* (Hart Publishing 2017), p.21.
[9] Fredman (n.6).
[10] Ibid.
[11] TEU, article 2.
[12] TEU, article 3(3).
[13] Dodo M., 'Historical Evolution of the Social Dimension of the European Integration: Issues and Future Prospects of the European Social Model' L'Europe en formation, <https://www.cairn.info/revue-l-europe-en-formation-2014-2-page-51.htm#pa8> accessed 23 May 2019.
[14] Ibid.
[15] The Community Charter was adopted by the heads of state or government of the then 11 Member States meeting at Strasbourg on 9 December 1989. The text is reproduced in 1 *Social Europe* 1990, pp.46–50, <www.eesc.europa.eu/ resources/ docs/ community- charter–en.pdf> accessed 1 June 2019.

the freedom to choose and engage in an occupation and showed that the social dimension was essential for the realization of internal market. The 'Social Chapter', which refers to the Social Policy Agreement that was concluded in Maastricht (December, 1991) by eleven Member States as the UK opted-out, extended qualified majority voting in employment-related areas (e.g. equality between men and women, information and consultation and working conditions).[16] The Treaty of Amsterdam (1997) incorporated the Social Chapter in the main Treaty that covers all EU Member States, as it had only operated on a twin-track at that time.[17] In addition to the latter, the 'Employment Policy Chapter' was primarily introduced in the Treaty of Amsterdam and further integrated in the Treaty of Lisbon (2009).[18] This 'Employment policy chapter' seeks to encourage the Member States to cooperate and develop the European Employment Strategy (EES), which as a reflexive process aims to set higher employment standards within the EU regime.

The Treaty of Lisbon has recognized the EU's Charter of Fundamental Rights (EUCFR) as a binding means of legislation in the EU legal order. The EUCFR of 2000, a key EU legal instrument for promotion of human rights, includes provisions, which are at the heart of labour (including different aspects of employment security) and social security law. Article 6 TEU also provides that the EUCFR's rights shall have the same legal status with the ECHR, if the EU accede to the ECHR. This tendency of labour law to communicate with other systems that promote fundamental rights, was described by Silvana Sciarra as 'transnational juridification'.[19] However, such accession seems problematic because the ECHR, which will be used as a source of inspiration, does not enshrine work-related (such as protection against unfair dismissal) and social security rights, if they do not fall in the field of other substantive provisions of the Convention (e.g. articles 8-11 ECHR). Nevertheless, the accession of the EU to the ECHR remains 'a theoretical debate' after the CJEU in Opinion 2/13, rejected the draft plan on the accession of the EU to the ECHR because such agreement would be incompatible with article 6(2) TEU or with Protocol (N.8).[20] As the CJEU explained *inter alia*, the fact that EU legal sources (including CJEU's rulings) will be examined by an external judicial body (ECtHR) does not fully preserve the autonomy of EU law.[21] In addition to this, the draft

[16] Ibid.
[17] Treaty of Amsterdam, provision 5, article B.
[18] TEC, article 13(1); TFEU, article 19(1).
[19] Sciarra S., 'Collective Exit Strategies: New Ideas in Transnational Labour Law' in Guy Davidov and Brian Langille (eds.) *The Idea of Labour Law* (Oxford University Press, 2011), p.407.
[20] Opinion 2/13 of the Court pursuant to Article 218(11) TFEU [2014] OJ C65/2.
[21] Ibid, para.183.

agreement did not provide any guarantee to ensure that the harmonization of standards between the EUCFR and the ECHR will ensure 'primacy, unity and effectiveness of EU law'.[22]

The concept of 'employment security' remains a complex and contested topic at EU-level. From a theoretical perspective, employment security describes the situation in which the individual remains in the labour market - either through securing a job or position in which they can stay (job security) or remaining in employment by finding alternative kinds of work (employment security in the broader context). From a flexicurity perspective (flexibility-security), as described in the EES, the transition of workers in the labour market can be achieved through social security protection, while promoting ALMPs and LLL. In the EUCFR, employment security takes the form of job security and access to employment in the broader context. The right to protection against unfair dismissal, which refers to job security (secure a job position), is recognized in article 30 EUCFR. This recognition seems to be an important step towards the understanding of job security as a human right. Whereas, the concept of employment security in the broader context appears in article 15 EUCFR (right to choose an occupation and right to engage in work) and article 16 EUCFR (right to conduct business). Articles 15 and 16 EUCFR reflect the need of the EU to broaden the scope of employment security.

The European economic distress, which also affected Cyprus, has required the EU system to react through employment security and social security transnational (re)regulation, and the key actors to reflect upon and change norms and practices.[23] From the perspective of reflexive law, legal instruments are conceived as 'procedural devices' for self-regulation,[24] which include social dialogue as an effective solution for easing complexities. Workers need protection due to the power imbalances that may exist in the workplace. This protection is provided either by setting minimum legal standards or through social dialogue. In the EU regime, social dialogue takes the form of consultations between management and labour at EU-level, either taking the form of tripartite or bipartite social dialogue, as explained in chapter 2.3.3. Nevertheless, as shall become apparent in this chapter, the EU social actors, representing management, labour and civil society, seem to struggle to mediate tensions between employment security and job security norms.

[22] Ibid, para.189.
[23] Rogowski R., *The Reflexive Labour Law in the World Society* (Edward Elgar Publishing 2013), p.87.
[24] Ibid, p.97.

In addition, it appears that the means of EU labour regulation have shifted from hard law to soft law. The regulation of employment security primarily appears in binding means of regulation in the context of gender equality in a market-based on equal pay and the protection of workers for economic dismissals. Regarding social security, the EU mechanism, which solely coordinates social security norms, aims to ease transitions, reduce complexities and facilitate the right to move within the EU (article 21(3) TFEU).

This chapter is divided in four sections. Section 5.2 investigates the regulation of individual dismissals in the field of non-discrimination, which constitutes a core value of EU law. Section 5.3 explores the regulation of job and employment security when workers are dismissed for economic reasons, which is a special type of transnational labour regulation. The EU Directives that regulate economic dismissals are: Collective Redundancies Directive 98/59, Protection of employees in the event of insolvency Directive 2008/94 and the Transfer of Undertakings Directive 2001/23. The existing literature that evaluates the regulation of job and employment security in the context of economic dismissals, covers the material scope and level of protection in the event of economic dismissals. However, it seems that there is a gap regarding the tensions that may arise between employment security as part of transitional employment and job security as identified above. The analysis in this context is focused on the legal standards that govern access to employment, which may take either the form of job security or employment security (i.e. remaining in the labour market). Here, the thesis investigates the role of procedural as well as substantive norms, as well as the role played by the social partners.

Section 5.4 examines the role of the EU regulatory mechanism as to social security coordination. The EU regulation is focused on the facilitation of the right to move within the EU, taking the form of coordination of norms. In comparison, the ILO and the CoE, establish a set of minimum standards for social security protection. This demonstrates that internal processes of each system (UN, ILO, CoE and EU) are determined by internal normative and functional limitations, which are established by the regulatory mechanism based on its core aims.

Section 5.5 focuses on two soft-law reflexive strategies, the EES and Social OMC, which as alternative means of regulation aim to foster employability and tackle social exclusion. Section 5.5.1 explains the procedure of EES, which entails *inter alia* the Integrated Employment Guidelines, the National Reports and the Country-Specific Recommendations (CSR). This

section shows that the EES is focused on employability, which reflects the commercial aspect of flexicurity, rather than on employment security, which is set as the over-arching aim of flexicurity in the 2007 EC Flexicurity Communication. This section also explores to what extent the Social OMC promotes social security protection and the implications of its primary focus on the transition of workers in the EU labour market. Section 5.5 further examines to what extent these two reflexive mechanisms that promote the concept of flexicurity could enhance the protection of employment security and social security.

5.2 Regulation of employment security in the field of non-discrimination

EU regulatory strategies in non-discrimination, which also impact on labour standards, are embedded in the principles of equality and human dignity (article 2 TEU). It appears that the EU regulation of individual dismissals, using hard law means of communication, is restricted to the field of non-discrimination. This demonstrates the different level of power dynamics between: on the hand the EU, which only provides protection to individual dismissals in the field of non-discrimination; and on the other hand, the ILO, which has adopted an entire Convention N.158 to protect individual dismissals offering protection for a broader range of reasons arguably influencing the ESC/RSC, which provides a general protection against unfair or unlawful dismissal (article 24 ESC/RSC).

Individual dismissals in the field of EU non-discrimination law are regulated using many specialized legal instruments rather than one single legal instrument. The fact that the protection of individual dismissals is dispersed in many EU non-discrimination legal instruments could possibly mean that the EU actors, which were involved in the drafting process, did not have strong incentives to enforce employment security protection *per se*. Nevertheless, it appears that the European social actors have a key role to play in the adoption of these non-discrimination instruments, as the EC shall consult management and labour prior to submission of proposals in the social and employment policy field.[25] In the initial stage of consultations, the EC asks the social partners general questions about the substance of the instrument, what EU action shall be taken and whether social actors are willing to initiate a

[25] TFEU, article 154.

dialogue.[26] The EC may also launch a second stage of consultations, through which the EC shall ask the EU social actors about the content of the proposal. [27]

This section explores the EU non-discrimination *acquis*, which govern individual dismissals on multiple discriminatory grounds.[28] It also entails analysis of the CJEU interpretative approach under article 267 TFEU.[29] The analysis begins with Recast Directive Equal Treatment in Employment and Occupation 2006/54, whose original legal instrument (Directive 76/207) is the oldest EU legislation that provides protection against unfair dismissals for reasons related to gender equality. Section 5.2.2 is focused on Maternity Leave Directive 92/85, since the 2010 EP amending Resolution was not adopted.[30] The reasons that lie behind the failure of the EU institutions to reach a conclusion on this matter could be the conflicting interests (maternity protection and other economic interests) and power imbalances between the involved actors. Section 5.2.3 further examines the legal framework of Paternity Leave Directive 2010/18, which replaced the original Directive 96/34, and the new Directive on Work-Life Balance for Parents and Carers.

The last two sections are focused on two 'post-Charter' EU non-discrimination instruments, which expanded extensively the scope of protection for individual dismissals in the field of non-discrimination. Article 21 EUCFR explicitly prohibits discrimination on grounds related to sexual orientation, disability, age, religion, belief, race or ethnic origin.[31] Section 5.2.4 deals with Directive 2000/43, which prohibits unfair individual dismissals on grounds related to racial or ethnic origin. Section 5.2.5 is focused on Directive 2000/78, which extends the list of prohibited discriminatory grounds – i.e. age, disability, sexual orientation, religion or belief. It is interesting that these two legal instruments were adopted twenty-three years later after Equality Directive 76/207.

[26] European Commission, VADEMECUM: Commission support to EU Social Dialogue: A practical Guide for European Social Partner Organizations and their National Affiliates (July 2017), p.46.
[27] Ibid.
[28] These grounds consist of sex, maternity leave, parental leave, race, religion, disability, age, and sexual orientation.
[29] Rogowski (n.23), p.39.
[30] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding COM (2008) 637 final.
[31] Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (EUCFR), article 21.

5.2.1 Directive 2006/54: Equal treatment between men and women in employment and occupation

In the Treaty of Rome (1957), the principle of gender equality was recognized as a core principle of the EU.[32] Historically, the principle of equal parity between men and women was primarily adopted at EU-level for pure economic reasons. To explain, the Member States (especially France) wanted to 'eliminate distortions in competition between undertakings' at domestic level.[33] France, which was the first Member State that had already adopted provisions to promote equal pay between men and women, was afraid that female workers could be cheap labour in the other Member States and this situation could possibly cause adverse economic effects on the economy of France.[34] It was only in *Defrenne* (1976) that the CJEU recognized that article 157 TFEU, which enshrines equal parity, embraces a social objective.[35] The original Equal Treatment Directive 76/207, which was further amended by Directive 2006/54, provided protection for individual dismissals either based on direct or indirect discrimination on grounds related to sex.[36] It is interesting that there are some cases related to gender equality and dismissals, whose scope can also fall within the scope of Maternity Leave Directive 92/85 and Parental Leave Directive 2010/18. However, the scope of Directive 2006/54 is quite broad. This means its scope is not restricted to issues related to maternity and parental leave because it also embraces other market-based issues (for example, equal pay, social security protection, participation in the vocational and education training schemes).

The normative prohibition of dismissals on grounds related to sex is enshrined in article 14 Directive 2006/54, which enables workers to secure their current job. This job security norm also exists in the other transnational systems: the ILO regime (ILO Conventions N.158 and N.111) and the CoE (article 1(2) RSC). The job security concept as embedded in the framework of Directive 2006/54 entails two types of job security norms. The first type of job security entails the prohibition of dismissal on grounds related to sex, whereas the second type of job security entails a combination of internal flexible working arrangements to avoid job insecurity. The second type of job security entails that a worker is primarily eligible to return to an equivalent job position after maternity leave which in some cases is also applied after

[32] TFEU, article 157; EEC, article 119; EC, article 141.
[33] European Network of Legal Experts in the field of Gender Equality, Susan Burri and Sacha Prechal, 'Gender Equality Law: Update 2013' accessed <http://www.ysu.am/files/DS0113847ENN_002.pdf>, 20 April 2018, p.2.
[34] Ibid.
[35] Case C-43/75 *Defrenne II* [1976] ECR-455.
[36] Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L204/2 (Directive 2006/54).

paternal/adoption leave (i.e. boosting employment security). In the context of States' discretion, the Member States are eligible to extend the scope of protection to paternal and, or adoption leave.[37] This job security norm also enables the worker to request his or her employer to provide him or her with flexible working arrangements (i.e. notions of internal flexibility), which would enable the worker to exercise the core form of job security and retain the current job.[38] Even if the other two international and European actors (UN/ILO/CoE) recognized the prohibition of dismissals on grounds related to sex, Directive 2006/54 established a stricter threshold. Article 15 of Directive 2006/54 introduced the concept of 'flexible working arrangements', through which working conditions will be adjusted to the workers' needs, so that the worker will be able to retain the current job(position).[39] Directives 2006/54 and 92/85 on Maternity Leave, analysed in the next section, are primarily focused on the protection of working parents with biological children.[40] This means working mothers with adopted children have not been included in the scope of protection, although parents of adopted children do now fall within the scope of Parental Leave Directive 2010/18. The role of social dialogue, which may take the form of collective bargaining, is crucial as to ensure the promotion of equal treatment between men and women.[41] For example, the social actors can ensure that paternal leave and adoptive leave are included in the scope of domestic legislation. The Member States shall also interact (taking the form of exchanging information) with interested NGOs.[42] The Member States could seek to engage interested NGOs in other forms of contribution (e.g. funding vocational training schemes) so that workers would be able to stay in employment.

It seems that the CJEU held a strict stance towards protection of pregnant mothers in accessing the labour market or retaining their job for reasons related to pregnancy or maternity. In *Hertz*, the CJEU reaffirmed the *Dekker* rule and established that the dismissal of female worker due to repeated periods of sick leave that are attributed to pregnancy or confinement would also be recognized as discriminatory practice.[43] The CJEU has also stated that Directive 76/207 (in particular articles 2(1), 2(3) and 5(1)) covers the illnesses that resulted from pregnancy or

[37] Directive 2006/54, article 16.
[38] Ibid.
[39] Ibid, article 15.
[40] Foubert P., 'Child Care Leave 2.0 – Suggestions for the improvement of the EU Maternity and Parental Leave Directives from a rights perspective' (2017) 24(2) *Maastricht Journal of European and Comparative Law* 245, p.250-251.
[41] Directive 2006/54, article 21.
[42] Ibid, article 22.
[43] Case C-460/06 *Nadine Paquay v Société d'architectes Hoet + Minne SPRL* [2007] ECR I-851, para.40.

confinement, even if the illness arose after maternity leave.[44] It has further noted that dismissal on grounds related to maternity leave, is prohibited despite the moment when the employee is notified of the decision for dismissal.[45] The CJEU held that reasons related to fertilisation treatment shall not constitute valid reason for dismissal as such practice, which only involves female workers, is discriminatory on grounds of sex.[46] In cases where the worker has not informed her employer about her pregnancy, even if the worker would not be able to perform her working tasks properly for a specific period, the dismissal of the pregnant worker cannot be justified under article 5(1) of Directive 76/207.[47]

With regard to article 3 of Directive 76/207, the CJEU held that the worker, who was dismissed during pregnancy, breastfeeding or the period that has recently gave birth to a child, is entitled to bring an action for damages.[48] Article 14 of Directive 2006/54 prohibits discrimination on grounds of sex in various areas that entail employment security components, which consist of conditions for access to employment (article 14(a) of Directive 2006/54) termination of employment (article 14(c) of Directive 2006/54), access to vocational training programmes and (article 14(b) of Directive 2006/54) and membership in workers' or employers' organizations (article 14(d) of Directive 2006/54).

In *Pedro Manuel Álvarez*, the CJEU held that the Spanish legislation (i.e. Basic Law 3/2007), which provides that male workers, who are fathers of a child, are entitled to take leave during the first nine months of the child's birth only if the child's mother is also employed, is discriminatory on the grounds of sex, as derived from articles 2(1), 2(3), 2(4) and 5 of Directive 76/207.[49] This case is distinguished from *Hofmann*, in which the CJEU decided that the legal norms shall respect the special relationship between the mother and the child during pregnancy and after childbirth.[50] The reason that these two cases differ the one from the other is because *Pedro Manuel Álvarez* examined the domestic legislation that provides protection for maternity/paternal leave before the expiry of the protective period, whereas *Hofmann* examined the national legislation that provided the granting of additional maternity leave, which was

[44] Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark, som representant för Helle Elisabeth Larsson mot Dansk Handel & Service, som representant för Føtex Supermarked A/S* [1997] ECR I-2757, para.26.
[45] *Nadine Paquay*(n.43), para.54.
[46] Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017, paras.50 and 54.
[47] Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECR I-699, para.34.
[48] Case C-63/08 *Virginie Pontin v T-Comalux SA* [2009] ECR I-10467, para.76.
[49] Case C-104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-8661, para.39.
[50] Case C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR I-3047, para.25.

reserved exclusively to the mother, after the expiration of the protective period.[51] The *Pedro Manuel Álvarez* case falls better within the scope of the Equal Treatment Directive rather than parental leave and maternity leave because it reflects the equal opportunities of men and women in the labour market. This situation would possibly enable the mothers with young children to enter/re-enter the labour market as fathers would also devote time to their children.

5.2.2 Maternity Leave Directive 92/85

Directive 92/85 protects mothers with biological children because article 2 of Directive 92/85 explicitly refers to 'pregnant workers, workers who have recently given birth, workers who are breastfeeding'.[52] This means mothers with adopted children are solely protected under Parental Leave Directive 2010/18.[53] The 2008 EP legislative resolution amending Council Directive 92/85, which was not adopted, extended the scope of protection and included mothers with adopted children.[54] Surrogate mothers are however currently excluded from the scope of protection.[55] In *Z.* and *C.D.*, the CJEU held that the refusal to provide paid parental leave to mothers who are unable to bear a child and had a baby through a surrogacy arrangements, are not included in the scope of article 14 of Directive 2006/54.[56] It is interesting that women that undertake vitro fertilisation treatment (IVF) are protected under Directive 92/85 as the CJEU established in *Mayr*.[57] This shows that the scope of maternity leave differs between Directive 2006/54 and Directive 92/85. Whereas, ILO Convention N.183, which endorsed a more universal and inclusive approach than Directive 92/85, provides protection to 'all employed women' (i.e. woman in the context of ILO Convention N.183 means 'any female person without discrimination whatsoever').[58]

The maternity leave shall be at least 14 weeks and mothers are entitled to the right to return to their job, which reflects a job security norm.[59] In comparison to Directive 2010/18, the social

[51] Ibid, para.26.
[52] Directive 92/85, article 2.
[53] Ibid, article 1.
[54] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding {SEC(2008)2595} {SEC(2008)2596} COM/2008/0637 final, article 1.
[55] Case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014] OJ C142/7, para.67; Case C-167/12 *C. D. v S. T.* [2014] OJ C142/6, para.55.
[56] Ibid.
[57] Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017.
[58] ILO Convention N.183, articles 1 and 2.
[59] Directive 92/85, articles 8 and 10.

actors can participate in assessment and information of working conditions.[60] Directive 92/85 sets a lower threshold than ILO Convention N.183 as to the compulsory period before and/or after confinement. Directive 92/85 entails a compulsory maternity leave for the first two weeks before and/or after the confinement, whereas ILO Convention N.183 entails the period of the first six weeks after the confinement, plus 14 weeks of maternity leave.[61]

Pregnant workers are also eligible to request from their employer flexible working arrangements and their employers are obliged to ensure that the working conditions do not cause any health and safety risk to the mother.[62] The employer is responsible to swiftly transition the female worker to another job position, which does not cause any risk to her, and enable the worker to remain in employment.[63] Nevertheless, the pregnant worker cannot control these flexible arrangements as they are decided in the interests of the unborn child. It also appears that Directive 92/85 does not entitle female workers with the right to flexible arrangements after pregnancy and maternity leave, which is an issue that is solely regulated at domestic level.

Despite flexicurity policies that could assist in mediating flexible arrangements and employment security, social actors struggle to mediate tensions between economic rights of the employer, social rights of the mother and the broader social interest of future generations. It is however sometimes possible to reconcile all three, so as to ensure that there is not longer-term departure from a job or the labour market. If transitions for female workers before maternity leave are not 'technically and/ or feasible', so that the pregnant worker cannot perform different tasks to avoid exposure to working conditions dangerous to the foetus, the worker shall be entitled to paid maternity leave for the period before the birth, which is required to ensure the protection of worker's health and safety.[64] This norm shows a very likely simultaneous reaction of employment security and social security systems (reflecting flexicurity) because the female worker retains a right to suitable alternative work, or in its absence, leave following which she can return to her current job. She is entitled to maternity benefit during her absence, if necessary, before as well as after the birth.

[60] Ibid, article 4.
[61] Directive 92/85, article 8(2); ILO Convention N.183, article 4(4).
[62] Directive 92/85, article 5(1).
[63] Ibid, article 5(2).
[64] Directive 92/85, article 5(3).

5.2.3 Parental Leave Directive 2010/18

The Parental Leave Directive 2010/18 is a product of European social dialogue, which took the form of negotiations.[65] EU social actors can initiate EU-level negotiations under article 156 TFEU and conclude an agreement that either will be implemented at domestic level by national social actors or be annexed to a legislative proposal under articles 154-155 TFEU. The new The Directive on Work-life balance for Parents and Carers, which was proposed under the new European Pillar of Social Rights, seeks to promote equality between men and women, equal opportunities in the labour market and equal treatment at workplace (article 3(3) TEU).[66] The new Directive adopts new rights, which includes the right to paternal leave, the right to carers' leave and the right to flexible working arrangements.[67] The right to parental leave cannot be defeated by technical changes to posts. There is a legitimate claim for breach of the Parental Leave Directive if the employer knew that a post was due to be abolished at the time that a returning employee was appointed to it.[68]

Before the adoption of the new Directive, which provides explicit protection to carers, there was a normative gap for carers' protection at EU-level. They were only covered under article 1 of ILO Convention N.156 and article 5 ILO Convention N.158. Directive 2010/18, which is replaced by the new Directive, covered parents with biological or adopted children and excludes parents under surrogate arrangements. However, parents under surrogate arrangements could possibly fall in the category of 'carers' in the new Directive on Work-Life Balance of Parents' and Carers. The Parental Leave Directive 2010/18 established a job security norm, which is also established in the new Directive, according to which dismissals on grounds related to parental leave shall be prohibited.[69] By way of contrast, the ECHR does not provide the right to parental leave *per se*, but examines the right to non-discrimination in the light of article 8 ECHR.[70] The parental leave shall be at least four months (of which the one month is non-transferable), a minimum standard that is not established in the ILO and CoE regimes.[71] The Member States/social actors are responsible to decide a notice period prior to

[65] Directive 2010/18, Annex, Clause 2(1).
[66] Directive (…/2019) of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] (not published yet).
[67] Ibid.
[68] Case C-7/12 *Nadežda Riežniece v Zemkopības ministrija and Lauku atbalsta dienests* [2013] OJ C225/23, paras.15-20.
[69] Directive 2010/18, Annex, clause 5.
[70] See further details about dismissals and article 8 ECHR in pp.95-96 of this thesis.
[71] Directive 2010/18, Annex, clause 2(2).

parental leave. This means it is up to these actors to decide any flexible arrangement of the notice period and promote employment security.

The nexus of internal flexibility and employment security, which is also enshrined in Directive 2006/54, aims to facilitate the worker to secure its current job or swiftly transition to another job position. The employer is responsible to arrange the internal flexible working conditions or terms after taking into consideration employers' and workers' needs.[72] Even if this norm promotes fairness, it would be unrealistic not to accept that it is difficult for employers to strike a proper balance between employers' needs (e.g. economic interests/competitiveness) and workers' needs (work-life balance). The provision on flexible working arrangements is improved by the new Directive, which provides the right of parents and carers to ask for remote working arrangements, flexible working schedules, or reduced working hours. This improvement is essential because an improper balance could possibly lead to modern forms of forced labour. Apart from these flexible working arrangements, Directive 2010/18, as amended by the new Directive, fails to promote vocational education and training schemes as ways in which to facilitate the return to work (either to the current job or to swiftly transition to another job position). This norm, which aims to enhance employability skills of the worker and enable him/her to remain in the employment (i.e. employment security norm) appears in ILO Convention N.158 (see chapter 3.3 for further analysis on ILO Convention N.158).[73]

5.2.4 Race Directive 2000/43

The Race Directive 2000/43 sets out a clear prohibition against dismissals on grounds related to racial or ethnic origin. However, difference of treatment on grounds related to nationality is not included in the scope of protection.[74] EU Directive 2000/43 established the following two-fold test to examine whether the practice is discriminatory or could be justified under the umbrella 'difference of treatment': first, the norm shall fulfil a legitimate objective and second, the norm shall be proportionate.[75] From the CJEU's approach, it appears that domestic courts enjoy a wide margin of appreciation in examining whether there was direct or indirect discrimination for reasons related to race or ethnicity. For example, in *Galina Meister*, the CJEU examined whether the applicant, who obtained a degree from a Russian institution in systems engineering recognized in Germany, was discriminated against by Speech Design,

[72] Ibid, Annex, clause 2(5).
[73] ILO Convention N.158, article 7.
[74] Directive 2000/43, article 3.
[75] Ibid, article 4.

which published a new vacancy for 'experienced software developers' and rejected the applicant's application for this position without justification.[76] The CJEU held that it is up to the domestic court to decide whether this justification was necessary taking into account various factors in the context of establishing facts from which it is rendered whether there was direct or indirect discrimination.[77] This case illustrates the procedural hurdles that an individual has to face to enter or re-enter the labour market, or even transition from one job to another.

The *Centrum* case, which was brought by a public authority in Belgium whose mandate is to foster the principle of equality, demonstrates that it might be easier for a public body than an individual to lodge complaints on non-discrimination on grounds related to race or ethnicity.[78] In this case, the Centrum, which is eligible to bring legal actions in case of discrimination because the Belgian legislation implemented Directive 2000/43, brought a claim against the company. As the company did not recruit workers with the status of 'immigrants', the Centrum brought legal proceedings against the company for its discriminatory recruitment policy. Provisions regarding the role of social actors and NGOs in the promotion of equality also appear in Directives 2006/54 and 2000/78.[79] In particular, Directive 2000/43 enables the inter-play of different bodies, which will be designated by the Member State to provide assistance to the victims of discrimination.[80] The scope of this provision could be expanded so that the Member State could also establish bodies, which could provide assistance to individuals that are not eligible to apply for/get a job, whose requirements are based on characteristics related to racial or ethnic origin.

5.2.5 Framework Directive 2000/78

The normative legal framework of Directive 2000/78 provides protection against discrimination on the grounds of age, disability, sexual orientation, religion or belief as discriminatory grounds.[81] In comparison with the ILO, the grounds of religion and belief appear as the basis for wrongful discrimination in ILO Convention N.158, whereas age is embedded in the Recommendation N.166, which facilitates the application of ILO

[76] Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] OJ C165/4, paras.3-4.
[77] Ibid, para.48.
[78] Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.
[79] Directive 2000/78, article 13.
[80] Ibid.
[81] Ibid, article 1.

Conventions.[82] This study examines the norms that promote equality in relation to each discriminatory ground in the context of employment security (either as job security or employment security in the broader context), as established in Directive 2000/78.

According to article 1 of Directive 2000/78, the ground of age is recognised as a discriminatory ground.[83] Although, there is an exception to the non-discrimination principle, according to which differences of treatment on grounds of age are allowed in specific circumstances.[84] These circumstances shall fulfil two criteria: the domestic norm shall be 'objectively and reasonably justified by a legitimate aim' and 'the means of achieving the aim are appropriate and necessary'.[85] Even if Directive 2000/78 sets out few examples of what shall be considered as 'difference of treatment' (article 6(1) Directive 2000/78), the domestic actors, using the means of preliminary procedure where necessary, shall examine the peculiar characteristics of each case and determine whether the aforementioned criteria are fulfilled. In comparison to ILO regime, even if the ground of age is only enshrined in Recommendation N.166, which is a non-binding instrument and facilitates the application of ILO Convention N.158. In addition, it is considered as discriminatory ground under ILO Convention N.111, which provides a general protection against discrimination in the field of employment and occupation.

The protection of individual dismissals in the field of non-discrimination can also be justified on other policy grounds, embracing the principle of human dignity, which is a core EU value (article 2 TEU) as a means of redesigning the means of regulation. Article 51 EUCFR sets out very clearly that the Charter, which promotes job security and employment security, creates obligations to the Member States only 'when implementing EU law', which means only in areas that are regulated by EU law.[86] In this context, the CJEU examined the protection of employment security in the spectrum of other public policies (e.g. transportation). In *Werner Fries*, the CJEU stated that the imposition of age limit in the field of commercial air transport as legitimate and proportionate.[87] The applicant was dismissed by his employer because he had reached the age of 65 and for this reason, he was no longer entitled to work as a pilot in commercial air transport under Regulation N.1178/2011. In this case, the norm seems to clash with article 21(1) EUCFR (i.e. prohibition of non-discrimination on the ground of age) and

[82] ILO Convention N.158.
[83] Directive 2000/78, article 1.
[84] Ibid, article 6.
[85] Ibid, article 6(1).
[86] EUCFR, article 51.
[87] Case C-190/16 *Werner Fries v Lufthansa CityLine GmbH* [2017] OJ C283/7.

article 15(1) EUCFR (the right to engage to work – in other words, to remain in the labour market). The CJEU held that civil aviation safety is 'an objective of general interest' and the imposition of age restriction for pilot's licence to act as a pilot in the commercial air transport serves a proportionate aim.[88] This requirement aims to avoid aeronautical accidents that caused by the pilot, whose physical capabilities were diminished with age.[89] The CJEU further stressed that this norm (i.e. prohibition of pilots to engage in commercial air transport al they reached 65 years) is an appropriate and necessary measure to achieve the over-arching aim of preserving civil aviation safety.[90]

This norm seems to restrict pilots' ability to freely choose an occupation and the freedom to conduct a business (article 15(1) EUCFR). According to the CJEU, this right, which is a non-absolute right, shall be 'considered [according] to its social function'.[91] It seems that the term 'social function' is not clearly defined and might leave questions as to interpretation. The CJEU also held that this restriction does not affect the substance of the right as enshrined in article 15(1) of EUCFR and the restriction, which was imposed, was legitimate and proportionate to the over-arching objective to preserve civil aviation transport.[92]

Age

The link between employment security and discrimination based on ground of 'age' remains one of the contested issues at EU-level. As statistics indicate, the rate of youth unemployment (aged 15-24) remains high in some EU Member States. For example, the rate of youth unemployment in Greece, which is the largest in the EU, is 18.5%, whereas the rate in Spain is 14%.[93] It seems the EU appears as 'a pioneer' since the other two transnational regulatory mechanisms (CoE, ILO/UN) do not create binding obligations in this sense. In *Abercombie & Fitch Italia Srl* , the employer dismissed the applicant because he reached the age of twenty-five years, in accordance to the Italian Government's interpretation of article 34 of the Italian Legislative Decree N. 276/2003.[94] The CJEU examined whether this norm can be justified by a legitimate aim and the means for achieving this aim are appropriate and necessary, as

[88] Ibid, paras.43-44.
[89] Ibid, para. 45-47.
[90] Ibid, para.73.
[91] Ibid, para.73.
[92] Ibid, paras.74-79.
[93] Eurostat official website, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Unemployment_statistics> accessed 23 May 2019.
[94] Case C-143/16 *Abercrombie & Fitch Italia Srl v Antonino Bordonaro* [2017] OJ C300/4, paras.16,26.

prescribed by article 6 of Directive 2000/78.[95] It is interesting that the Italian Government argued that this norm (restriction) serves a legitimate aim, as it aims to make the labour market more flexible and increase levels of employment.[96]

The Italian Government claims that this norm enables young workers to enter the labour market and acquire experience, which predominantly seems to embrace the idea of flexicurity (as it seems to facilitate the transition from unemployment to employment).[97] This norm seems to create a tension between employment security and job security because this norm, which aims to increases flexibility of labour market to enable young workers to enter the labour market, creates adverse effects to job security for workers over 25 years old, since it could possibly lead them to unemployment and social exclusion. This case illustrates the tendency of some employers to replace workers rather than create an inclusive labour market for everyone that provides decent jobs for all. The applicant argued that an individual 25-year-old with some years of work experience is in a better position to seek a job rather than a young worker that has not entered the labour market yet. In this context, the CJEU held that this measure served a legitimate aim for employment and social security policies and the means for reaching this aim were considered necessary and appropriate.[98]

Disability

Directive 2000/78 also enables the disabled worker to request from the employer to adjust working conditions (indicating internal flexibility) to his/her needs, although such flexible working arrangements shall not cause a 'disproportionate burden on the employer'.[99] This threshold, which aims to promote the idea of 'difference of treatment' on grounds of age, constitutes an exemption to the principle of non-discrimination. The norm is conceived as difference of treatment rather than a discriminatory norm if it satisfies a two-fold test: firstly, the norm serves a legitimate aim and secondly, the means to achieve this aim shall be 'appropriate and necessary'.[100]

The CJEU interpreted the material scope of disability in light with the CRPD to determine the scope of equality on grounds of disability (i.e. prohibition of dismissal on grounds of disability

[95] Ibid, para.30.
[96] Ibid, para.32.
[97] Ibid, para.32.
[98] Ibid, para.47.
[99] EU Directive 2000/78, article 5.
[100] Ibid.

is applicable to public and private employees).[101] This reflects the cognitively openness of the EU system. In *Milkova*, this feature of the EU to communicate with the ILO, as the international standard-setting actor for labour protection, led the CJEU to expand its scope and include public employees under Directive 2000/78.[102]

Religion and belief

With regard to religion/belief, the CJEU in *Achbita*, held the company's internal policy shall be considered as difference of treatment based on religion. In this case, the applicant was dismissed because she insisted on wearing a headscarf at the workplace, even though it was contrary to the workplace regulations of the company.[103] The company adopted a general company policy of political and religious neutrality, according to which 'employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs'.[104] The Higher Labour Court stated that Ms. Achbita was not dismissed for her religious beliefs, but because she insisted on wearing religious signs at workplace.[105] It also added that the company's policy of 'blanket ban of wearing visible signs of religion at workplace' cannot be considered as discriminatory practice.[106] The Court of Cassation referred a preliminary ruling to the CJEU and asked whether the ban of wearing a headscarf, which falls under the company's blanket ban policy, could be considered as discrimination.[107] In this context, the CJEU examined the two-fold test, which is established in Directive 2000/78 and assessed whether this policy is 'objectively justified by a legitimate aim and secondly, the means are appropriate and necessary.[108] This internal policy (i.e. blanket ban of wearing religious signs at workplace) served a legitimate aim because the employer has the discretion to promote 'an image of neutrality' to its customers, which enabled the employer to exercise the freedom to conduct business as enshrined in article 16 EUCFR. This case reflects the power imbalances between the employer's interests (right of conduct business such an occupational requirement) and the interests of workers (to wear religious symbols in all areas). Even if such 'blanket ban' policies

[101] UNCRPD, article 1; Case C-406/15 *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control* [2017] OJ C144/7, paras.3-5.
[102] Ibid.
[103] Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] OJ C151/3, paras.10-18.
[104] Ibid, para.17.
[105] Ibid.
[106] Ibid, paras 10-18.
[107] Ibid.
[108] Directive 2000/78, article 2(2)(b).

are legally accepted, the workers with religious beliefs, who conceive wearing a religion symbol as part of their identity (such as female Muslim workers), are placed in a disadvantaged position.

Regulation of employment security as exists in the EU regime embraces the over-arching principle of non-discrimination, which constitutes a core value of EU law as enshrined in article 2 TEU. In this context, the EU as a self-regulatory autopoietic system creates norms that are adjusted to different grounds of non-discrimination. The illegitimate grounds for discrimination identified at the EU level has increased through the years, from sex discrimination that embraces economic interests to other grounds that promote social objectives – such as age and racial discrimination. However, it seems that there are still problems with the power balances and dynamics in regulating and distinguishing discriminatory practices from difference of treatment. The CJEU seems to play a catalytic role in this context, as it examines cases through the preliminary reference procedure, which could be characterized as unilateral communication. The term 'unilateral' is used to describe the preliminary reference procedure because the information as derives from the EU is not exchanged but is solely transmitted from the EU to the Member States. The scope of different treatment, which blurs the line between grounds that could or could not be justified, as enshrined in the EU hard-law instruments and further interpreted by the CJEU is particularly important in the context of flexicurity (transitions of workers in the labour market). In these cases, the role of social security regulation, which could take either the form of unemployment benefit or educational benefit, is considered here as a means for easing the transitions of workers from one job to another.

5.3 Regulation of employment security: economic dismissals

The Council, acting as the key EU regulatory actor in the creation of EU economic dismissal laws under the special legislative procedure (article 153(d) TFEU), adopted binding legal instruments to regulate economic dismissals after the burst of the last major European-wide financial crisis in the 1970s. The three EU binding legal instruments for economic dismissals consist of: Collective Redundancies Directive 98/59 (amending original Directive 75/129), Directive 2001/223 (replacing original Directive 77/187) that regulates the procedures for transfer of undertakings and Insolvency Directive 2008/94 (amending original Directive

80/987) that aims to guarantee payment of workers in the event of insolvency. EU hard-law instruments on economic dismissals require employers to follow specific procedures, which were agreed at EU-level through transnational regulation, to terminate an employment relationship for reasons that are not related to workers' status, performance or capabilities. These means of regulation attempt to increase workers' protection in the functional system of internal market. The question that needs to be posed in this context is to what extent these EU Directives, which primarily aim to promote job security and guarantee payments in the event of insolvency, shifted their aim towards promotion of employment security. Has their content and operation adjusted to the concept of flexicurity, which aims to facilitate transitions in the labour market? In other words, it is interesting to explore to what extent these procedures manage to strike a proper balance between the interests of workers to promote employment security and the economic benefits to employers following from flexibilization of economic dismissals procedures (for example, to increase the enterprise's competitiveness level).

EU regulation of economic dismissals also reflect the normative divergences between the EU and the ILO, the UN and the CoE, which conceive employment security standards as part of the human rights regime and are primarily interested in the regulation of employment security in the field of non-discrimination.[109] It seems that the link between the regulation of economic dismissals and the respect of human dignity, which normally acts as a normative and moral justification for human rights, might not be as profound as in EU regulation of individual dismissals in the field of non-discrimination, which is analysed in section 5.2.[110] The question is 'to what extent should employers take responsibility' for violation of human dignity in this context and to what extent the EU may impose such responsibility.[111] The precondition of dignity, namely the ability to get paid a salary adequate for 'all aspects of life'[112] presupposes the ability of the worker to have a job, which refers to the ability of the worker to remain/enter/re-enter the employment. The procedures for regulating economic dismissals provide safeguards to the worker to either retain a current job (through consultations between employers and workers' representatives to mitigate the risk of dismissal) or facilitating the worker's transition in the labour market. In this context, the interests of workers could be

[109] Rogowski (n.23), pp.98-99.
[110] McCrudden C., 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *EJIL* 655, pp.656-658.
[111] Davidov G., *A Purposive Approach to Labour Law* (Oxford University Press 2016), p.89.

represented through the procedures of information and consultation, which are established in the EU legal instruments (see further details on the specific procedures in sections 5.3.1-5.3.3).

Section 5.3.1 explores EU Directive 98/59 on Collective Redundancies, which gives the opportunity to employers to propose collective dismissals and understand their legal obligations. Section 5.3.2 examines the Council Directive 2001/23 (amending original Directive 77/187) and investigates the safeguards that are provided to employees in the event of transfer of undertakings, business or part of undertakings or businesses (these safeguards include consultations and notification) to promote job security. Whereas, section 5.3.3 is focused on the Council Directive 2008/94, which was amended multiple times, that regulates the procedures for protecting the employees in the event of the insolvency of their employer. This section merely discusses the safeguards (in terms of payment) that are provided to workers and could facilitate their transition in the labour market.

5.3.1 Collective Redundancies Directive 98/59

Council Directive 75/129 was the first international and European legal instrument to establish the key foundations for transnational regulation of collective redundancies. It introduced the definition of 'collective redundancies' and the core procedures that employers must fulfil to propose collective redundancies. These procedures consist of the notification of public authorities and workers' representatives prior to collective redundancies and consultations with workers' representatives prior to dismissal, which could mediate the conflict of employers' and workers' interests and avoid redundancies. At international level, ILO Convention N.158 of 1982, which was adopted seven years after the original Directive 75/129, set minimum standards for employment security, but has not distinguished between individual and collective dismissals. To explain, collective redundancies just fall under the scope of 'operational requirements of the undertaking, establishment or service' in article 4 of ILO Convention N.158, which sets out the valid reasons for dismissals. The EU instruments actually offer more protection regarding the specific issues surrounding collective economic dismissals.

EU Council Directive 98/59 replaced the original legal instrument, Directive 75/129, and extended its scope of protection. Examples of the major changes that were introduced by the new Directive include specific procedures for collective redundancies that arose from termination of the establishment's activities after a judicial decision (article 3 of Directive 98/59). It further increased the thresholds in the procedures for collective redundancies. For example, the consultations of employers with the workers' representatives shall begin 'in good

time' (article 2(1) of Directive 98/59). In addition, the workers' representatives have the right to 'call on the services of experts', which could be used to find alternative routes and mitigate the risks of redundancies (article 2(2) of Directive 98/59). These procedures could integrate the concept of flexicurity and either, secure the job worker (avoiding collective redundancies) or facilitate the transition of worker in the labour market (e.g. by providing educational benefits).

In this context, it is vital to investigate in more depth the criteria and procedures that are set out in Directive 98/59 (amending Directive 75/129). The term 'collective redundancy' is defined as a 'dismissal effected by an employer for one or more reasons not related to the individual workers concerned'.[113] The employer shall meet the following four criteria for proposing collective redundancies: i) the technical criterion of dismissal ii) numerical iii) temporal and iv) local (which refers to the idea of 'establishment).[114] Firstly, collective redundancies refers to dismissal at the initiative of the employer, which means that there shall be 'a direct manifestation of the will of the employer consisting in taking the initiative'.[115] With regard to ii) and iii) requirements, Member States are eligible to choose either conditions as prescribed in article 1(a)(i) or article 1(a)(ii) of Directive 98/59.[116] According to article 1(a)(i) of Directive 98/59, the number of redundancies shall be one of the following within a period of 30 days: minimum 10 redundancies in small establishments (i.e. with 20 - 100 workers), minimum 10% of the number of workers in larger establishments (i.e. with 100 - 300 workers), or minimum 30 redundancies in major establishments (i.e. with more than 300 workers).[117] According to article 1(a)(ii) of Directive 98/59, the number of redundancies within a period of 90 days shall be minimum at least 20 regardless the number of workers that are normally employed in the establishment.[118] Directive 98/59 introduced a new provision according to which if the number of redundancies in a small establishment (i.e. with workers 20-100) exceeds the number of five and the reasons for the dismissal are not related to the individual worker, then these redundancies fall in the scope of the Directive.[119] This provision is particularly interesting because it shows a more liberal approach to workers that are employed in small undertakings.

[113] Directive 98/59, article 1(a).
[114] Ibid.
[115] Case C-323/08 *Ovidio Rodríguez Mayor and Others v Herencia yacente de Rafael de las Heras Dávila and Others* [2009] ECR I-11621, Advocate-General Opinion, para.28.
[116] Directive 98/59, articles 1(a)(i) and 1(a)(ii).
[117] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16, article 1(a)(i).
[118] Ibid, article 1(a)(ii).
[119] Ibid, article 1(i).

The fourth requirement refers to the concept of 'establishment', which consists of 'a distinct entity, having a degree of permanence and stability, which is assigned to perform one or more given tasks and that has a workforce, technical means and a certain organizational structure allowing for the accomplishment of those tasks'.[120] This interpretation seems to raise problems because Directive 98/59 could also cover 'single workers of an establishment, which is distinct and separate from other undertakings' and such an interpretation seems to be contrary to the definition of a 'collective redundancy'.[121] In this context, the CJEU clarified that an establishment is included in the wider context of an undertaking.[122] This means that article 1(1)(a)(i) and (ii) Directive 98/59 shall be interpreted as the minimum number of redundancies shall not be less than the prescribed number of workers 'from a particular establishment of an undertaking'.[123] In *Athinaïki Chartopoiïa AE,* the CJEU held that the production unit at issue was not necessary to show a degree of 'legal, economic, financial, administrative or technological autonomy' to be regarded as 'establishment', due to the adverse socio-economic impact that constructive redundancies could cause 'in a local and social environment'.[124] This ruling illustrates how the labour system, which creates its own internal rules, is cognitively open and interacts with the economic system so that its own norms can have practical effect in the real life and meet social objectives (e.g. tackle unemployment and social exclusion).

Directive 98/59 introduced EU legal rules on three areas that are related to collective redundancies, where laws of Member States should have been harmonized ('approximation of the laws of the Member States').[125] These areas consist of compulsory consultation with workers' representatives prior to collective redundancies, compulsory notification of competent public authorities prior to collective redundancies and additional powers of public authorities in the procedure for collective redundancies.[126] These powers include the power to reduce or extend the length of notice period prior to dismissal.[127] It seems that all these norms, which Directive 98/59 aims to coordinate, can be used as protective nets against employment insecurity/job insecurity. The power to reduce or extend the length of notice period

[120] Case C-80/14 *Union of Shop, Distributive and Allied Workers (USDAW), B. Wilson v WW Realisation 1 Ltd, in liquidation, Ethel Austin Ltd, Secretary of State for Business, Innovation and Skills* [2015] OJ C213/8, para. 49.
[121] Ibid, para.64.
[122] Ibid, paras.50,66 and 71.
[123] Ibid; Case C-182/13 *Valerie Lyttle, Sarah Louise Halliday, Clara Lyttle, Tanya McGerty v Bluebird UK Bidco 2 Limited* [2015] OJ C236/2, para.53.
[124] Case C-270/05 *Athinaiki Chartopoiia AE v L. Panagiotidis and Others* [2007] ECR I-1499, paras.28 and 31.
[125] Directive 98/59.
[126] Ibid, articles 2, 3 and 4.
[127] Ibid, article 4.

demonstrates a level of flexibility that could facilitate the shift from one job to another or from employment to unemployment in the absence of ALMPs.

Regarding consultation and information with workers' representatives, article 2(1) of Directive 98/59 provides that such consultations shall begin 'in good time with a view to reaching an agreement'.[128] Jan Heinsius points out that social dialogue is used here to 'mitigate [the risk and] avoid the dismissal, or reduce the number of dismissals'.[129] This articulation shows the protective angle of social dialogue under Directive 98/59, which aims to foster employment security, balancing the interests of both parties (workers and employers). Nevertheless, the case-law of the CJEU demonstrates that there are some problematic aspects regarding the interpretation of the legal norms as established Directive 98/59. In *Akavan Erityisalojen Keskusliitto AEK ry and Others*, the CJEU interpreted the term 'in good time', which is described as at the time when a 'strategic or commercial decision' is taken that obliges the employer to 'contemplate or to plan for collective redundancies'.[130] It appears that as long as this strategic or commercial decision has been taken, the employer shall begin the consultations with workers' representatives, regardless of whether or not the employer is able to provide the appropriate information to the workers' representatives, as prescribed in article 2(3)(b) of Directive 98/59.[131] In *Junk*, the CJEU held that a collective redundancy arises at the time that an employer explicitly declares his intention to terminate the contract of employment.[132] The CJEU noted that an employer is eligible to contemplate a collective redundancy after consultations with workers' representatives and notification of the projected collective redundancies as prescribed in articles 2 and 3 of Directive 98/59.[133]

All the above cases reflect the temporal procedural issues that affect the right of workers to retain their current jobs or receive the appropriate severance pay. It is worth noting that Directive 98/59, which regulates the procedures for collective redundancies, does not set out any requirements for severance pay. This also shows the notions of normative divergence between the EU and the ILO. To explain, ILO Convention N.158 sets out two core criteria, the length of employment and the level of wages that shall be considered for the calculation of

[128] Ibid, article 2(1); Case C-80/14 (n.120), para.71.
[129] Heinsius J., 'The European Directive on Collective Dismissals and its Implementation Deficits' (2009) 25(3) *International Journal of Comparative law* 261, p.262.
[130] Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy* [2009] ECR I-8163, para.49; Case C-188/03 *Irmtraud Junk v Wolfgang Kühnel* [2005] ECR I-885, para.39.
[131] Ibid, paras.48-49.
[132] Case C-188/03 *Irmtraud Junk v Wolfgang Kühnel* [2005] ECR I-885.
[133] Ibid, para.39.

the severance pay.[134] The level of severance pay, which is an issue that shall be negotiated between employers' and workers' representatives based on the national legislation/practices, could play an important role in facilitating the transitions in the labour market – i.e. the severance pay could possibly be used by the worker to pay for his participation in educational/vocational training schemes and improve the worker's level of employability. The exclusion of severance pay from the EU's legislative competence illustrates the complexity of this issue (reflecting the traditional order of each system). To explain, the severance pay is not legally regulated in all Member States (e.g. Finland and Sweden) or its regulation is a combination of company agreements/individual contracts and legal regulation.[135] In addition, the most common norm among the Member States is that the employer pays directly the severance pay to the employee, whereas the Republic of Cyprus has a national redundancy fund (contributed by employers' contributions 1.2% of employees' earnings funds).[136]

In *AGET Iraklis*, the CJEU examined whether Directive 98/59 entails the public authorities, without prior consultations with workers' representatives, to authorise the projected collective redundancies assessing the following conditions: a) the conditions in the labour market, b) the situation of the undertaking and c) the interests of the national economy.[137] The applicant, AGET Iraklis, decided to close the Chalkida plant and dismiss 236 workers as part of their new restructuring scheme.[138] After the refusal of workers' representatives to discuss the issue (Union of Cement Workers), the AGET Iraklis requested from the public authorities (i.e. the Ministry of Labour) to authorize the projected redundancies.[139] The Supreme Labour Council, which examined the projected collective redundancies, refused to authorize the projected collective redundancies based on the three aforementioned reasons.[140] The CJEU held that the employer can implement collective redundancies even if there is no prior negotiations with workers' representatives, as long as the competent public authorities have authorized such redundancies.[141] This is very interesting because it reflects the flexibilization of procedural thresholds, according to which the employer shall negotiate with workers' representatives.

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[134] ILO Convention N.158, article 12(1)(a).
[135] European Foundation for the Improvement of Living and Working Conditions, 'Statutory regulations on severance pay in Europe' (2015, Dublin) EF/14/74/EN, <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.co.uk/&httpsredir=1&article=1438&context=intl> accessed 20 May 2019, p.2.
[136] Ibid.
[137] Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* [2016] OJ C53/10, para.26.
[138] Ibid, para.14.
[139] Ibid, para.16.
[140] Ibid, paras.18-19.
[141] Ibid, para.44.

This flexibilization seems sensible because the workers' representatives refused to negotiate, which shows that the CJEU seems to facilitate the transitions in the labour market. The CJEU has particularly held that the competent domestic courts are authorized to decide whether domestic legislation, which sets out the three assessment criteria, could 'deprive the provisions of the directive of practical effect' and therefore, the employer cannot affect collective redundancies.[142] The CJEU also held that reasons of high unemployment and economic distress cannot affect the interpretation of Directive 98/59 as given above in the first preliminary question.[143]

The consultations of employers and workers' representations, which constitute a core part in the procedure for collective redundancies that aim to mitigate the risk of dismissals, could give the opportunity to workers' representatives to negotiate the criteria proposed for the selection of workers to be dismissed in the context of collective redundancies.[144] In this context, it is important to note that pregnant workers, which are considered by the CJEU as 'exceptional cases', can be brought in the scope of Directive 98/59 and dismissed for reasons not related to pregnancy.[145] This ruling is not *per se* problematic because it gives to the pregnant worker the same rights as the rest of workers in the context of collective redundancies and the employer is obliged to explain the 'exceptional circumstances' that led to inclusion of the pregnant worker in the redundancy plan. This decision reflects the vital need to provide the appropriate safeguards in the procedure of economic dismissals to the workers and emphasizes the importance of consultations as a means to mitigate the adverse effects of collective dismissals. In the broader context, this ruling also reflects the importance of strengthening the link between employment security and social security systems, which could minimize the risk of exposing workers into social exclusion and/or unemployment.

Nevertheless, social dialogue takes the form of information and consultations in the context of Directive 98/59, which regulates the procedures for collective redundancies. Apart from informing workers' representatives in good time, which was discussed above, the workers' representatives shall 'make constructive proposals' about multiple issues (such as, reason of dismissal, number of people that will be affected by projected redundancies the criteria for

[142] Ibid.
[143] Ibid, para.108.
[144] Directive 98/59, article 2(3)(b)(v).
[145] Case C-103/*16 Jessica Porras Guisado v Bankia S.A., Fondo de Garantía Salarial and Others* [2018] OJ C134/3.

selecting workers that will be affected).[146] As shown in the next sub-section (section 5.3.2), it seems that a similar attitude is endorsed in the context of transfer of undertakings under Directive 2001/23, which shows that arising issues are supposed to be resolved between employers and workers' representatives based on a climate of trust, confidence and mutual respect.

The legal framework of Directive 98/59 seems to embrace the idea of ALMPs, as a means to promote employment security since the person that performs real work in the context of traineeship, internship, or apprenticeship is also brought under the umbrella of the term 'worker' as defined in EU law.[147] In *Ender Balkaya*, the CJEU clarified that reasons related to 'low productivity levels' and 'less working hours' cannot have any consequence as to whether the person would be regarded as 'worker'.[148] This means Directive 98/59 could give the opportunity to workers, who participate in new and atypical forms of work to fall in the scope of the Directive and exercise the right to consultations and negotiations prior to collective dismissal. The CJEU has further noted that the person, who serves traineeship or apprenticeship, is included in the scope of protection regardless the origin of funding of remuneration (e.g. by the public authorities that are responsible for the promotion of employment) and the legal framework of the employment relationship in terms of vocational training and apprenticeship (e.g. full-time or part-time job).[149]

This decision seems to be a stepping-stone regarding the regulation of employment security in the context of flexicurity. The integration of workers who participate in modern forms of employment could facilitate the transitions of workers in the labour market. It could play a catalytic role to give incentives to workers (by making them feel more secure) to take part in educational/vocational training schemes to improve their employability and meet the occupational requirements, which are required to get a job and if necessary, swiftly transition in the labour market. This legal framework, which was introduced in *Ender Balkaya*, is especially important since neither the EU Directive 98/59 nor ILO/UN/CoE regulate the funding of ALMPs, which is a gap that could possibly be filled through the EU reflexive policy mechanisms (i.e. the Social OMC and EES).[150]

[146] Directive 98/59, article 2(3).
[147] Case C-229/14 *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* [2015] OJ C294/11, para.50.
[148] Ibid.
[149] Ibid, paras.39,40 and 50.
[150] See further details about the Social OMC and EEC at section 5.5. (EU reflexive mechanisms); see also about the ALMPs as flexicurity component in section 2.3.2.

5.3.2 Directive 2001/23: Transfer of undertakings

Directive 2001/23, which amended the original Directive 77/187, provides protection to employees in the event of a change of employer and attempts to strike a fair balance between the rights of employees and the interests of the transferees.[151] The ideas lying behind Directive 2001/23 are that the transferred worker can work under the same terms and conditions for the new employer and be protected from unfair dismissal on grounds related to the transfer of undertaking, business or part of the undertaking or business as prescribed in article 4 of Directive 2001/23.[152] The amended Directive made major developments in this context because it set out the specific cases that cannot be excluded from the scope of protection. For example, it has set out that the number of working hours may not play a decisive role in excluding specific categories of workers from the scope of protection, which seems to be catalytic as to enabling the workers that participate in new forms of employment in securing a job (and possibly tackling precariousness).[153]

The transferor's rights and obligations are transferred to the transferee (article 3 Directive 2001/23), reflecting the *raison d'être* of Directive 2001/23. The transferee is entitled to 'observe the terms and conditions agreed in any collective agreement', regardless of whether the collective agreement expired.[154] This case illustrates the importance of the collective agreements as procedural mechanisms to safeguard workers' rights, which could also play a role in mitigating the risk of job insecurity. However, collective agreements that were concluded after the date of transfer and the transferee has not been involved in the negotiation process are not included in the scope of article 3 of Directive 2001/23, even when the contract of employment indicates that the agreement falls in the scope of Directive 2001/23.

In *Mark Alemo-Herron and Others*, the CJEU examined whether the employees have dynamic rather than static contractual rights against the transferor, which is agreed by a third party collective bargaining body.[155] In the present case, the Lewisham London Borough Council, a

[151] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16; Case C-336/15 *Unionen v Almega Tjänsteförbunden and ISS Facility Services AB* [2017] OJ C168/7, para.19.
[152] Directive 2001/23, article 4.
[153] Directive 2001/23, article 2(2).
[154] Case C-328/13 *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* [2014] OJ C409/15, para.31.
[155] Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* [2013] OJ C260/6, para.37; Prassl J., 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law: Case C-426/11 Alemo-Herron and others v Parkwood Leisure Ltd' (2013) 42(4) *Industrial Law Journal* 434.

public entity, entered into agreement with CCL to contract out of the leisure services in 2002, and as a consequence the employees of the Lewisham Council became employees of the CCL.[156] During the employment in Lewisham, the terms and conditions of employees were agreed between the Lewisham Council and NJC (the local collective bargaining body) through collective agreements.[157] Two years later (May 2004), CCL was sold to Parkwood, which does not participate in the NJC because it is a private entity.[158] In June 2004, the NJC concluded a new agreement on pay increase, however Parkwood informed its employees that the agreement is not binding to it.[159] In this context, the Supreme Court of the UK referred to the 'static' and 'dynamic' protection of employees after the transfer of undertakings – static protection means that the collective agreement shall not be applicable, whereas, dynamic protection means that the agreement shall be applicable.[160] The CJEU held that the interests of the transferee (contractual freedom) is seriously limited because the transferee, which is not part of the NJC, is not able to negotiate the working conditions of its employees and this could cause a detrimental impact on the transferee's freedom to conduct a business.[161] Arguably, this limits the role of continuing collective agreements and collective bargaining post transfers.

In cases where a 'substantial change in working conditions' could be detrimental for the employee, the employer shall be regarded as responsible for the termination of employment contract or relationship (article 4(2) of Directive 2001/23).[162] This provision seems to be crucial in the period of economic distress, during which the employers tend to make changes to boost the enterprise's productivity levels. Directive 2001/23 intends to achieve partial harmonization and for this reason, it has not set out the legal consequences of employer's responsibility. In this context, the CJEU examined whether the right to financial compensation is included in the scope of article 4(2) of Directive 2001/23.[163] As the CJEU held, the Member States are not obliged to safeguard the right to financial compensation to workers whose employment is terminated for reasons related to transfer of undertakings, although the domestic courts shall ensure that the transferee employer takes the legal consequences of such termination – e.g. payment of salary and payment of appropriate benefits related to notice

[156] Ibid (C-426/11), para.9.
[157] Ibid, para.10.
[158] Ibid, para.12.
[159] Ibid, para.13.
[160] Ibid, para.17.
[161] Ibid, paras.36-38.
[162] Directive 2001/23, article 4(2).
[163] Case C-396/07 *Mirja Juuri v Fazer Amica Oy* [2008] ECR I-8883, para.20.

period as determined in the context of national law.[164] It is worth noting that Directive 2001/23 and Directive 98/59 do not provide the appropriate safeguards for the payment severance pay, which is left at the discretion to the Member State's actors (such as the national courts).

Article 1 of Directive 2001/23 sets out the definition of 'transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger'.[165] The CJEU held that 'a court or tribunal against whose decisions there is no judicial remedy' shall send a preliminary question on the interpretation of article 1(1) of Directive 2001/23 to the CJEU.[166] This is particularly important because the interpretation of article 1(1) of Directive 2001/23, and in particular the phrase 'a transfer of a business' has caused difficulties in various Member States as to interpretation, the domestic courts are obliged to refer a preliminary question in order to avoid the risk of misinterpretation of EU law.[167] It appears that the CJEU has given 'a sufficiently flexible interpretation' of article 1 of Directive 2001/23 to preserve the aim of the Directive and safeguard the interests of workers in the event of transfer of undertakings.[168] It also established limits to the interpretation of article 1 of Directive 2001/23. For example, a municipal authority that decided to terminate its employment contract with a private company that was responsible for the cleaning of the municipality's premises and hire new workers to undertake the same working tasks (i.e. cleaning of its premises) could not fall in the scope of protection as derived from Directive 2001/23.[169]

According to article 1(b) of Directive 2001/23, the transfer shall entail 'a transfer of an economic entity which retains its identity.[170] In *CLECE*, the CJEU set out that the identity of an economic entity, which shall be preserved after the transfer of undertaking, could be the group of workers that are assigned to a particular task.[171] In this context, the CJEU held that Directive 2001/23 also covers situations where an undertaking, business, or part of an undertaking or business has not managed to preserve its 'organizational autonomy' after the transfer.[172] The concept of 'organizational autonomy' could include change of working hours

[164] Ibid, para.30.
[165] Directive 2001/23, article 1.
[166] Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português* [2015] OJ C363/14, para.45.
[167] Ibid, para.44.
[168] Case C-463/09 *CLECE SA v María Socorro Martín Valor and Ayuntamiento de Cobisa* [2011] ECR I-95, para.29.
[169] Ibid, para.43.
[170] Directive 2001/23, article 1(b).
[171] Case C-463/09 *CLECE* (n.166), para.39.
[172] Case C-466/07 *Dietmar Klarenberg v Ferrotron Technologies GmbH* [2009] ECR I-803, para.53.

or working tasks, or assigning an employee to a position that is equivalent to its previous position, although these changes shall not cause any harm or damage to the worker ('detriment of employee').[173] In cases of causing detriment of employee due to organizational changes of the undertaking or business, the employer is to be regarded as responsible for the termination of employment relationship or contract.[174] This shows that the regulation of economic dismissals through Directive 2001/23 is merely focused on fostering job security. Article 4 of Directive 2001/23 reflects a defence, according to which economic, technical or organizational (ETO or ETOR) reasons that led to changes in the workplace can constitute a valid reason for dismissal.[175] This means that Directive 2001/23 restricts the level of job security for reasons related to economic, organizational or technical changes in the case of transfer of undertakings, while providing a flexibility to employers because it gives them the opportunity to terminate an employment relationship in this context.[176] At this point, the regulation of social security system shall play a key role to ensure that the workers who are dismissed on ETO grounds can remain in the labour market (either in the form of unemployment benefit or educational benefit which will facilitate such transitions).

Directive 2001/23 further introduced that the Member States have the discretion to exclude workers from the scope of protection of article 4 based on the national legislation or practices. This means that workers that participate in new types of employment (such as trainees) could be excluded from the scope of Directive and be dismissed on grounds related to the transfer of the undertaking or business. This could leave these workers exposed to the risk of unemployment. The only safeguard that could mitigate the adverse effects on the workers is the obligation of the employer to negotiate the issue with the workers' representatives (article 7 Directive 2001/23). This safeguard was introduced in the original Directive 77/187, however Directive 2001/23 extended its scope, which includes *inter alia* the obligation of the employers to consult workers' representatives about the date/proposed date of the transfer.[177] According to the *Federatie Nederlanse Vakvereniging* case, the transfer of undertaking shall take place following a declaration of insolvency.[178] The amended Directive 2001/23 also clarified that the employers cannot use the excuse of not being provided with the appropriate information by

[173] Ibid, para.52.
[174] Ibid.
[175] Barnard C., *EU employment law* (4th edn, Oxford University Press 2012) p.614.
[176] Collins H., Ewing K. and McColgan A., *Labour Law* (Cambridge University Press 2012), p.898.
[177] Directive 2001/23, article 7(1).
[178] Case C-126/16 *Federatie Nederlandse Vakvereniging and Others v Smallsteps BV* [2017] OJ C277/15, para.59.

the undertaking to justify a breach of the information and consultation safeguards of Directive 2001/23.[179]

It seems that even if Directive 2001/23 is primarily focused on fostering job security through the procedure of transfer of undertakings, its scope of protection goes beyond the exact activity of transfer. In particular, the transferee when terminating the employment of an employee, is obliged to take into account the length of service that the worker acquired with the transferor and subsequently, the calculation of the employee's length of service and the notice period that is required.[180] This shows that the rights of the employee are not lost after the end of transfer procedure, which emphasizes the macro-scale protection of Directive 2001/23 that provides the appropriate safeguards to the employees that were transferred. These safeguards could possibly include other rights that would enhance employment security – e.g. consultations and notification.

Apart from the exclusion of workers based on their type of employment, the Member States are eligible to exclude specific types of 'transfers' from the scope of protection (article 5 of Directive 2001/23). These types refer to the 'transfers' that are subject of 'bankruptcy proceedings' or 'any analogous insolvency proceedings' that comply with two criteria: firstly, it aims to the liquidation of the transferor's assets and secondly, the insolvency is supervised by a competent public body. This shows that the job security protection of workers entails a combination of technical tests or criteria that need to be satisfied, which could restrict the scope of protection under Directive 2001/23. The most problematic aspect is that all the procedural safeguards that are set in Directive 2001/23 cannot be applied in these cases, which means that these types of transfers can only be regulated through national regulation or through soft-law policy mechanisms.

Social dialogue, taking the form of information and consultations, could be used as a tool to ease power imbalances which arise in the context of the application of Directive 2001/23 and mitigate the risk of exposing workers to dismissal. As article 7 of Directive 2001/23 provides, the employer (transferor or transferee) is responsible to inform workers' representatives 'in a good time' prior to transfer of undertakings, which is a provision that also exists in Directive 98/59.[181] It is noteworthy that Directive 2001/23 does not provide that workers' representative

[179] Directive 2001/23, article 7(4).
[180] Case C-336/15 *Unionen v Almega Tjänsteförbunden and ISS Facility Services AB* [2017] OJ C168/7, para.33.
[181] Directive 2001/23, article 7.

shall 'make constructive proposal' as in Directive 98/59.[182] Instead, the Directive sets a baseline of the normative content of consultations, according to which workers' representative shall at least cover issues about 'any measures envisaged in relation to the employees'.[183] Social dialogue could be used to ensure: on the one hand, there is no additional burden placed on companies that could affect their level of competitiveness, but on the other hand, workers are protected to the greatest extent from the risk of dismissals. In this context, consultations could also include the issue of employability, as a measure to increase productivity of the company and the worker, ensuring that the worker can remain in employment. However, it seems that there is significant absence of access to protection of collective bargaining as a stronger form social dialogue, which means that 'any balance of employers' and employees' interests is not required'.[184]

5.3.3 Insolvency Protection Directive 2008/94

Directive 80/987 provides a legal framework to protect employees in the event of insolvency of their employer, which could facilitate the transition of workers to another job or ensure severance pay. It also provides protection to employees in cases where a request for insolvency has been made for the opening of proceedings involving the employer's assets to satisfy collectively the claims of creditors and which make it possible to take into consideration.[185] The most recent amendment of the original Directive 80/987, which was replaced multiple times, is via Directive 2008/94. This Directive integrated *inter alia*: first, the core principles of the original Directive (i.e. material scope, the guarantee institutions, social security protection); and second, the provisions concerning transnational situations (Chapter IV) of Council Directive 2002/74 and 2008/94, which were introduced to facilitate transitions in the EU labour market. Apart from the transnational situations, the key difference between the amending instruments is based on the categories of workers that could be excluded from the scope of protection. Nevertheless, the Insolvency Protection Directive 2008/94, which is primarily focused on guaranteeing the payment of outstanding claims, aims to provide safeguards to workers' payment, rather than persuading employers that are in the state of insolvency to preserve job security.

[182] Directive 98/59, article 2(3).
[183] Directive 2001/23, article 7(1).
[184] Prassl J., 'Business Freedoms and Employment Rights in the EU' (2015) 17 *Cambridge Yearbook of European Legal Studies* 189, p.199.
[185] Directive 80/987, article 2(1)(a).

In this legal framework, there are terms whose interpretation is left at the discretion of the Member States – i.e. 'employee', 'pay', 'employer', 'right conferring immediate entitlement' and 'right conferring prospective entitlement'.[186] According to the *José Vicente Olaso Valero* case, the Member State is entitled to decide whether the term 'pay' includes compensation for unfair dismissal.[187] The term 'pay' shall be interpreted in such a way as to include compensation for unfair dismissals awarded by judicial or administrative decision or under conciliation procedures.[188] This terminological broadness leaves room for the Member States to adjust the term to the current challenges and ensure that the individual would be able to secure a benefit after insolvency.

The Member States are also entitled to impose a time-limit for the exercise of rights as derived from Directive 80/987, as long this time-limit fulfils the following criteria: a) it does not make 'impossible from a practical point of view or excessively difficult' the exercise of such rights b) respects the principle of proportionality ('not disproportionate') and c) respects the principle of equality.[189] It seems that article 12 of ILO Convention N.173, which also covers severance pay of workers in the event of insolvency, sets out more detailed criteria than Directive 80/987.[190] To explain, this provision provides that the normative content of the Convention protects *inter alia*: a) workers' claims on wages for a 'prescribed period', which means not less than eight weeks prior to the insolvency or prior to the termination of the employment; b) workers' claims about holiday pay for a period, which was not less than six months prior to the insolvency or prior to the termination of employment.[191]

Directive 2008/94 (along with the original Directive 80/987) aims to safeguard employees in the event of the insolvency of their employer through payment of employees' outstanding claims.[192] In this context, Directive 2008/94 provides rules for harmonization to guarantee institutions guarantee (article 3 of Directive 2008/94) and payment of employees' outstanding claims (article 4 of Directive 2008/94). However, article 4 of Directive 2008/94 provides that the Member States are able to 'limit the liability of guarantee institutions' as prescribed in article 3 of Directive 2008/94.

[186] Ibid, article 2(2).
[187] Case C-520/03 *José Vicente Olaso Valero v Fondo de Garantía Salarial* [2004] ECR I-12065, para.33.
[188] Ibid, para.38.
[189] Case C-125/01 *Peter Pflücke v Bundesanstalt für Arbeit* [2003] ECR I-9375, para. 66.
[190] ILO Convention N.173, article 12.
[191] Ibid, article 12 (a) and (b).
[192] Directive 80/987, Preamble.

In *van Ardennen*, the CJEU held that Member States are not eligible to adopt a domestic legal rule which obliges employees to register as job-seekers as means to fulfil their right to payment of outstanding claims.[193] Even if article 10 of Directive 2008/94 provides that the Member States are able to 'take necessary measures to avoid abuses', the CJEU stated that obliging employees to register as jobseekers is not brought under article 10 of Directive 80/987.[194] This ruling seems sensible as it respects the choice of the individual to transition from employment to inactivity.

It seems that the procedural requirements play a core role in the context of severance pay, since in some cases the employer is eligible to dismiss workers after insolvency without being obliged to pay a severance pay. In *Maira María Robledillo Núñez*, the CJEU held that severance pay ('compensation for unfair dismissal') that is recognized in extra-judicial conciliation procedure could be excluded from the scope of article 3 of Directive 2008/94, which enshrines the obligation of the guarantee institutions to pay employees' outstanding claims that resulted from termination of employment relationship or employment contract.[195] As the guarantee institution has no right to intervene in the extra-judicial conciliation procedure, it appears that the procedure 'does not offer sufficient guarantees of the avoidance of abuse'.[196] According to article 10(a) of Directive 2008/94 that has already been aforementioned, the Member States are able to take the appropriate means to avoid abuse.[197] On this basis, the CJEU held that the Member States could exclude compensation for an unfair dismissal, which is recognized in extra-judicial conciliation procedure.[198] Such exclusion is understood by the CJEU as a necessary step to avoid abuse.[199] The rules as derived from Directive 2008/94 apply in the same manner (respecting the principle of equality) in cases where compensation for unfair dismissal is recognized from judicial or administrative body, or under conciliation procedures.[200]

According to article 4(3) of Directive 2008/94, the Member States are able to 'set a ceiling to the liability of employees' outstanding claims' to safeguard the social aim of the Directive.

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[193] Case C-435/10 *J. C. van Ardennen v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* [2011] ECR I-11705, para.38.
[194] Ibid.
[195] Directive 80/987, article 3; Case C-498/06 *Maira María Robledillo Núñez v Fondo de Garantía Salarial* [2008] ECR I-921, para.27.
[196] Ibid (Maira case), para.40.
[197] Directive 80/987, article 10(a); *Ibid.*, para.27.
[198] Ibid, paras.40,44.
[199] Ibid.
[200] Case C-246/06 *Josefa Velasco Navarro v Fondo de Garantía Salarial* [2008] ECR I-105, para.37; Case C-81/05 *Anacleto Cordero Alonso v Fondo de Garantía Salarial* [2006] ECR I-7569, para.42.

Although the CJEU explicitly stated that such limitation shall not be set in cases where the payment of sums would be insufficient to cover the basic needs of employees.[201] The concept of basic needs seems rather obscure as it is a matter of doubt what it means. It could possibly refer to short-term basic needs (such as food, water, shelter) rather than long-term socio-economic needs (e.g. participation in the ALMPs) that would enable the worker to find a job. The criteria to set this ceiling in the EU seems to be more technical than in the ILO regime. To explain, article 4(3) of Directive 2008/94 states that the Member State is eligible to set this ceiling after giving the appropriate information to the EC, setting out the methods. Whereas, article 7 of ILO Convention N.173 sets out that this ceiling is set only after consultations with workers' and employers' representatives.[202] In other words, EU regulation does not integrate the contextual framework of the ILO Convention, which attempts to mitigate the risks of dismissals through consultations, but it leaves the onus on the Member States to alleviate the costs of dismissals.

The provisions concerning transnational situations, which were primarily introduced in Directive 2002/74 and further endorsed in Directive 2008/94, regulate the inter-play of domestic actors in the payment of the outstanding employees' payment. According to article 8(1) of Directive 2002/74, if the undertaking performs activities in two or more Member States, then the guarantee institution shall be that in the Member State, where the employees either 'work or habitually work'.[203] The purpose of the transnational provisions is to facilitate the administrative procedures between the Member States, through exchanging the appropriate documents.[204] The CJEU decided various cases about these transitional provisions, in which it has applied strictly the criteria that are established in Council Directive 2008/94 (i.e. the place of 'work or habitually work'). In the Opinion of Advocate General (AG), Mengozzi attempted to ease the complexity of transnational regulation regarding the issue of which Member State is competent.[205] The AG introduced an additional criterion to determine which Member State shall be responsible to alleviate the costs in the context of transnational situations. This

[201] Joined cases 19/01, 50/01 and 84/01 *Istituto nazionale della previdenza sociale (INPS) v Alberto Barsotti and Others* (C-19/01), *Milena Castellani v Istituto nazionale della previdenza sociale (INPS)* (C-50/01) *and Istituto nazionale della previdenza sociale (INPS) v Anna Maria Venturi* (C-84/01) [2004] ECR I-2005, para.40.
[202] ILO Convention N.173, article 7.
[203] Directive 2008/94.
[204] Ibid, article 10(1).
[205] Case C-477/09 *Charles Defossez v Christian Wiart and Others*, Opinion of Advocate General Mengozzi [17 November 2010] ECR I-1421, para.43.

criterion refers to 'the social and language environment with which they are familiar', which seems to reflect the social objective of the Directive.[206]

As a concluding remark, the regulation of economic dismissals, which is tightly linked to the operation of internal market, entails a combination of job security protections in the context of collective redundancies and transfer of undertakings and employment security protections in the context of insolvency. The job security protection under Directives 98/59 and 2001/23 are not sufficient on their own to facilitate the transition of workers in the labour market. In this context, it is important to strengthen the connection between employment security and social security (taking the form of educational benefits and unemployment benefits) to reduce the risk of exposing workers in unemployment.

5.4 Regulation of social security

EU regulation of the social security system created procedural norms to achieve two over-arching goals that are related to its functions as described in the Treaty of Rome, which were further integrated in the subsequent Treaties. Firstly, the EU aims to coordinate social security to promote the freedom of movement of workers (article 45 TFEU) and enable Member States' social security systems (as complex systems) to work more effectively together. Secondly, this regulatory regime creates norms that are adjusted to the core principle of non-discrimination (on grounds of nationality within the EU), which is embedded in the coordination of social security. This second normative objective is also integrated with other dispersed EU legal instruments on non-discrimination to ensure that EU citizens enjoy the right to social security regardless their personal status and characteristics (e.g. race, ethnicity, religious belief).

The coordination of social security systems was firstly introduced in Regulations 3 and 4 of 1956, which shows that these coordinating procedures were set as a priority in the EU regime. The concept of 'social security coordination' integrates the theory of legal pluralism, according to which there are multiple social security systems that reflect the diverse legal traditions of Member States. The core aim of coordinating social security systems is to secure social security benefits of workers and their siblings, who exercise their freedom of movement, so that individuals will be able to transition easily in the EU labour market. From a reflexive law perspective, the term 'coordination of social security' entails communication of social security

[206] Ibid.

systems through EU internal procedures. These EU coordination procedures, which do not aim to harmonize social security standards, are only used in cases where the workers move/reside in another Member State from the Member State of residence/employment.

The concept of 'social security' exists in each system, which being normatively closed system adjusts that conception to its aims and functional operation. Apart from the coordination of social security systems, the EU also ensures the promotion of non-discrimination in the area of social security protection, which constitutes a core value of the EU. Nevertheless, the absence of minimum baseline for social security standards at the EU-level emphasizes the normative divergence between the EU and the other international/regional standard-setting actors (UN/ILO and CoE), which set social security norms to respect and promote the right of social security. The EU mainly regulates the technical 'practicalities' of social security benefits when two Member States are involved in the process to facilitate the operation of internal market. For example, the EU regulates which body is responsible to grant the social security benefit. Whereas, ILO Convention N.102 enshrines that medical benefit shall be provided to workers to 'maintain, restore or improve the health of the person protected and his ability to work and to attend to his personal needs'.[207] Nevertheless, the Social OMC, which is analysed further in section 5.5.2, as a reflexive process attempts to encourage the creation of social security standards at domestic level.

Section 5.4.1 focuses on the EU coordination of social systems, with particular focus on Regulation 883/2004 and examines the existing normative complexities that could create barriers in the transition of workers in the EU labour market, such as the absence of an unemployment benefit. Section 5.4.2 examines the social security regulation in the field of non-discrimination as exists in the hard-law instruments and attempts to investigate to what extent the social security system could possibly communicate with that of employment security.

5.4.1 Coordination of social security systems

The concept of 'coordination of social security systems' was primarily introduced in Regulation 3 of 1958 and later embedded in Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community and

[207] ILO Convention N.102, article 10(3).

Regulation 574/72.[208] The scope of social security coordination was further extended in Regulation 883/2004, replacing Regulation 1408/71.[209] The modernization of EU rules on the coordination of Member States' social security systems is introduced through Regulation 988/2009 and the supplementary Regulation 987/2009, which specifies the measures and procedures for implementing Regulation 883/2004.[210]

The EU coordination of social security norms stems from article 48 of the Treaty of Lisbon, according to which the EP and the Council are entitled to adopt social security norms to facilitate freedom of movement of people (and their siblings) within the EU.[211] This provision covers aggregation, calculation and payment of social benefits.[212] The coordination of social security systems reflects the effort of the EU to ease the internal differentiation of domestic social security systems and facilitate the transition from one job to another within the EU. This section attempts to explore the principles of social security coordination and which are challenges, such as the lack of definition of 'family benefits'.

There are four core principles that are established in the coordination package, which were introduced in Regulation 1408/71 and further reaffirmed in Regulation 883/2004. These principles consist of equality of treatment (articles 4 and 5 of Regulations 1408/71 and 883/2004), aggregation (articles 6 of Regulations 1408/71 and 883/2004), the principle of a single applicable law (article 11(1) of Regulations 1408/71 and 883/2004) and exportability (article 7 of Regulations 1408/71 and 883/2004).[213] Frans Pennings articulated the view that Regulation 883/2004 modernized coordination of social security norms, by introducing the principle of 'equal treatment of benefits, income and facts' (article 5 of Regulation 883/2004).[214] However, social security standards are restricted by the principle of

[208] Council Regulation (EC) 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2.
[209] Council Regulation (EC) 883/2004 of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.
[210] Council Regulation (EC) 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L284/1; Council Regulation (EC) 988/2009 of 16 September 2009 amending Regulation (EC) No 883/2004 on the coordination of social security systems, and determining the content of its Annexes [2009] OJ L284/43.
[211] TFEU, article 48.
[212] Ibid.
[213] Regulation 883/2004.
[214] Frans Pennings, 'Introduction: Regulation 883/2004 – The Third Coordination Regulation in a Row' (2009) 11 *Eur. J. Soc. Sec.* 3, p.7.

aggregation,[215] which means that EU legislation determine which Member State is responsible to calculate and pay social benefits.[216]

The EU social security protection covers: the individuals who are nationals of Member States (including employed or self-employed individuals), refugees or their survivors' (Regulations 1408/71, 574/72, 883/2004, 987/2009, Directive 2004/38) and third-country nationals, who work and reside in a Member State (Directive 2011/98). After adoption of Regulation 883/2004, the coordination of social security norms are not solely addressed to economically active people.[217] The new provision seems to reflect the universal nature of article 6(1) ECHR and article 1 of Protocol 1 annexed to ECHR, which encompass the right to social security.[218] Article 6(1) ECHR refers to 'everyone', whereas article 1 Protocol 1 of the ECHR covers 'every natural or legal person'.[219] The arising question is if there are any complications that arose from the general scope of Regulation 883/2004. This means other individuals without the status of worker could be included in the scope of protection of Regulation 883/2004, such as students and voluntary emergency helpers.[220] It seems that the general nature of Regulation 883/2004 does not facilitate the transition from one job to another as the status of worker and residency plays a crucial role for social benefits. For example, an unemployed individual would not be able to receive social benefits from another Member State as he would not have obtained the legal status to stay in the other Member State.

The conditions of nationality and residence play a crucial role for EU social security protection and act as prerequisites for granting social security benefits. The term 'residence' as described in article 1(j) of Regulation 883/2004 refers to 'the place where a person habitually resides'.[221] In addition, article 11 of Regulation 883/2004 sets outs a list of elements that shall be concerned in determining residence – these criteria include the period that the individual was present in a Member State.[222] In *B.*, the CJEU held that an individual, who is registered in a territory although he does not work or habitually reside in that Member State, is excluded from Regulation 883/2004.[223] For example, a person (Mrs. B.), who was permanent resident in a Member State (i.e. Czech Republic), does not fall in the scope of Regulation 883/2004, as

[215] Ibid.
[216] Ibid.
[217] Regulation 883/2004, articles 2 and 3.
[218] Protocol 1 of the ECHR, article 1; ECHR, article 6(1).
[219] Ibid.
[220] Fuchs M., 'Accidents at Work and Occupational Diseases' (2009) 11 *Eur. J. Soc. Sec.* 163, p. 165.
[221] Regulation 883/2004, article 1(z).
[222] Ibid, article 11.
[223] Case C-394/13 *Ministerstvo práce a sociálních věcí v B.* [2014] OJ C409/16, para.34.

neither Mrs. B. nor her family members worked in that Member State.[224] In other words, the norms for social security coordination are based on two principles: the principle *lex loci laboris* (i.e. the applicable law of the Member State in which the individual is employed) and *lex loci domicilii* (i.e. the applicable law of the Member State in which the individual resides).[225] These principles create concerns as to what extent these principles are applicable to specific cases (such as 'family benefits of cost-compensating schemes).[226]

In the case of frontier workers, Regulation 883/2004 sets out a more flexible provision, according to which family members of frontier workers, who reside in the competent Member State, are entitled to social security benefits, even if the worker stays outside the competent Member State.[227] Regulation 883/2004 is depended on *lex loci domicilii* rather than the principle *lex loci labori* to ensure that the siblings of posted workers are protected under Regulation 883/2004. The concept of frontier workers is determined by the sending Member State, which in some cases this created complexities.[228] In *Calle Grenzshop*, the CJEU stated that the worker, who resided in one Member State and the undertaking of his work was in another Member State, was not a posted worker, even if the worker was regularly undertaking activities in the Member State of his residence.[229]

Article 3 of Regulation 883/2004 sets out the branches of social security that the Member States shall ensure that nationals of a Member State, stateless persons, refugees and their survivors enjoy the same benefits under the legislation of any Member State as the nationals thereof.[230] These branches include sickness, maternity, paternity, employment injury ('accidents at work and occupational diseases'), unemployment and family benefits.[231] Member States have the discretion to exclude contributory or non-contributory social security schemes, which are set out in the Annex of Regulation 883/2004.[232] The Republic of Cyprus, which is the case study in this research, has not introduced any exclusions to Regulation 883/2004.[233] With regard to the rights of third-country nationals, Directive 2011/98 relies on Regulation 883/2004 as to

[224] Ibid, para.34.
[225] Schoukens P. and Pieters D., 'The Rules within Regulation 883/2004 for Determining the Applicable Legislation (2009) 11 *Eur. J. Soc. Sec.* 81, 118, p.106.
[226] Ibid.
[227] Regulation 883/2004, articles 18(2) and 19.
[228] Schoukens and Pieters (n.225), p. 110.
[229] Case C-425/93 *Calle Grenzshop* [1995] ECR 1-269.
[230] Regulation 883/2004, articles 1 and 3.
[231] Regulation 883/2004.
[232] Ibid, annex.
[233] Ibid.

setting out the rules of social security system.[234] Although the branches of social security are clearly set out in the Regulation 883/2004, there are cases where the benefit that introduced at domestic level does not clearly belong to a particular branch of social security corresponds. In this context, the CJEU held that to distinguish the different branches of social security, it is vital to consider 'the risk covered' by each social security benefit.[235]

Before examining the various social security rules as developed in the EU regime, it is necessary to explore the general principles as derived from Regulation 883/2004. According to Regulation 1408/71 (title II: 'Determination of the legislation applicable), the applicant of the prescribed social security protection falls in one of the categories as prescribed in articles 13-14 of Regulation 1408/71.[236] The individual, either employed or self-employed in a Member State, shall be entitled for social security benefits from that Member State.[237] As regards public servants, they are entitled to social security benefits from the same Member State whose administration is also employing them.[238] In case of posted workers, they are entitled to receive social security benefits from the sending Member State, as long as their stay in the receiving Member State does not exceed the period of twenty-four months.[239] According to the revised Directive on posted workers, when the posting exceeds the 12 month-period, workers that are posted to their territory shall enjoy the terms and conditions of employment of the Member State, where they carry out the work.[240] However, this provision does not cover 'supplementary occupational retirement pension schemes' and terms/procedures for termination of employment.[241] Article 12(2) of Directive 883/2004 sets out that self-employed workers, who normally work in one Member State and they pursue a similar professional activity to another Member State for a period less than twenty-four months, are entitled to social security benefits from the Member State that they normally work.[242]

Regulation 883/2004 sets out special rules for each branch of social security, which are based on the four main principles as prescribed in title II of the Regulation.[243] Regarding sickness, maternity and paternity benefits (chapter 1: title III of Regulation 883/2004), the individual and

[234] Directive 2011/98, article 12(e).
[235] Case C-216/12 *Caisse nationale des prestations familiales v Fjola Hliddal* [2013] OJ C344/29, para.52.
[236] Regulation 1408/71 (title II: 'Determination of the legislation applicable).
[237] Regulation 883/2004, article 11(3)(a).
[238] Ibid, article 11(3)(b).
[239] Ibid, article 12(1).
[240] Directive 2018/957, article 1(a).
[241] Ibid.
[242] Ibid, article 12(2).
[243] Ibid, title II.

the members of his or her family, who do not habitually reside in the competent Member State, they shall receive the same benefits from the Member State of residence.[244] This rule is not applicable to posted workers, which are entitled for social security benefits from the competent Member State.[245] In case where an individual shall stay (i.e. 'temporary residence') in another Member State from the competent Member State for medical reasons, then the Member State may be entitled for social security benefits from the second Member State.[246]

A crucial complexity of medical benefits is the difference in the levels of cover in force in the Member State of affiliation and in the Member State of stay, respectively. In *European Commission v. French Republic*, the CJEU held that the Member State is eligible to impose 'objective and non-discriminatory' requirements for medical benefit, which covers care in and outside hospital.[247] In the present case, the CJEU held that the prior authorisation is a measure to control costs and resources (e.g. financial or technical), but it might 'deter or prevent' individuals from obtaining the appropriate treatment.[248] An example of high cost of medical equipment is the positron emission tomography, which is used by the UK and France for treatment of cancer.[249] This case shows that lack of medical benefits seems to be a major restriction on the facilitation of workers' transitions in the labour market because workers who are not able to receive proper medical treatment, might also not be able to keep/return to their job, which could possibly increase the risk of employment insecurity. This situation illustrates the 'deficit' of EU social security regulation, which does not regulate the normative substantive aspect of social security standards. In other words, it does not set minimum standards for medical benefits and cost sharing. In contrast, ILO Convention N.130 specifies that medical benefit shall ensure that the worker 'shall be [able] to maintaining, restoring or improving the health of the person protected and his ability to work and to attend to his personal needs'.[250]

Occupational disease or accident at work

The workers that suffered from occupational disease or injury while they stay or reside in another Member State from the competent Member State, are entitled to receive employment injury benefits from the Member State of stay or residence.[251] In case of aggravation of an

[244] Ibid, article 17.
[245] Ibid, article 18(1).
[246] Ibid, articles 1(k), 19(1).
[247] Case C-8/02 *Leichtle* [2004] ECR I-2641, para.28.
[248] Case C-512/08 *European Commission v French Republic* [2010] ECR I-8833, para.32.
[249] Ibid, para.39.
[250] ILO Convention N.130, article 9.
[251] Regulation 883/2004, article 36(2).

occupation disease, then the competent Member State shall bear the cost of the benefits and take into account the aggravation, only if the person that suffered from the occupational disease has not pursued an activity in another Member State.[252] Whereas, if the person has pursued an activity in another Member State, then the competent Member State shall not take into account the aggravation of an occupational disease.[253] The EU norm seems to be stricter than ILO Conventions N.102 and N.130, which stipulate that the States (who are ILO Members) are eligible to request from the beneficiaries to share in the cost of benefits.[254] Whereas, the European Code for Social Security (ECSS) does not regulate who bears the cost for medical benefits.

The lack of funds for medical benefit could create impediments for workers to retain their work (job security) or transition to another job position (preconditions for flexicurity). Maximilian Fuchs raised the issue of the absence of adequate 'accident insurance institutions', which means that other institutions shall participate in the payment of costs for occupational diseases.[255] This might create complexities in cases where the Member State shall take into consideration different elements to determine whether the qualified period is completed, which occurred in other Member States.[256] For example, article 61(5) of Regulation 1408/71 stipulates that the competent institutions shall take into account previous accidents at work or occupational diseases that occurred in other Member State to determine the degree of capacity of worker.[257]

It is also important to mention at this stage the principle of exclusivity, according to which the individual shall seek to get compensation from the Member State that was the last country of employment and if this is not possible, the applicant is eligible to obtain compensation from the Member State of previous employment (article 57 (1) of Regulation 1408/71).[258] This principle extends the scope of protection as derives from Regulation 1408/71, since it provides to the individual an alternative route to seek compensation (i.e. social benefits for occupational disease or accident at work).

[252] Ibid, article 39(a).
[253] Ibid, article 39(b).
[254] ILO Convention N.102, article 1(1)(f); ILO Convention N.130, article 1(i).
[255] Fuchs M., 'Accidents at Work and Occupational Diseases' (2009) 11 *Eur. J. Soc. Sec.* 163, p.166.
[256] Ibid.
[257] Regulation 1408/71, article 61(5).
[258] Ibid, article 57 (1).

Unemployment benefits

The unemployed individual is entitled to unemployment benefits from the competent Member State, after completing a period of insurance, employment, or self-employment.[259] The coordination of unemployment benefits seems to foster the concept of flexicurity at national level, as unemployed individuals, who are not entitled to receive unemployment benefits from a Member State because they have not completed the appropriate period of qualification, have to return home and seek for job. This period of insurance or employment is determined, taking into consideration periods of employment or insurance that completed in any other Member States.[260] Regulation 883/2004 also provides that the period of employment, under the legislation of another Member State, shall be taken into consideration only if such period is considered as period of insurance.[261]

As a general principle, the individual is entitled to unemployment benefits, under the legislation of the Member State of residence – this reaffirms the aforementioned statement about flexicurity.[262] For unemployed individuals that seek work in another Member State from the competent Member State, the person is entitled to unemployment benefits, if the individual is registered as unemployed and remains available to the employment services of the competent Member State before his departure to the other Member State.[263] The unemployed individual shall also register as unemployed in the employment services of the Member State that he left. According to article 64(1)(c) of Regulation 883/2004, the unemployed individual, who has not been available to the employment services of the Member State that he left for a period that exceeds three months, shall not be entitled to unemployment benefits.[264]

In cases where the individual is 'partially or intermittently unemployed' and during his last activity as employed or self-employed, resided in other Member State than the competent Member State, then he is entitled to receive unemployment benefits from the competent Member State.[265] Although, 'a wholly unemployed individual', who his last activity as employed or self-employed was in another Member State and he still resides or returns to that Member State, shall be entitled to receive unemployment benefits from the Member State of

[259] Regulation 883/2004, article 61(1).
[260] Ibid.
[261] Ibid.
[262] Ibid, article 11(3).
[263] Ibid, article 64(1).
[264] Ibid, article 64(1)(c).
[265] Ibid, article 65(1).

residence.[266] In *Monique Chateignier*, the CJEU reaffirmed that the eligibility of unemployment benefit is subject to the completion of a period of employment in the competent Member State.[267] This shows that coordination of unemployment benefits does not facilitate transition from unemployment to employment, if the individual has not completed the required period of employment or insurance.

Regulation 883/2004 does not define 'unemployment benefits', which means the CJEU (along with domestic actors) shall determine in which cases an individual is eligible to receive unemployment benefits. The CJEU's case-law demonstrated that the lack of definition of 'unemployment benefits' caused problems, however, the social security systems reflect the domestic traditions and it would be difficult to harmonize the definition of 'unemployment benefits'. In *Knoch* and *Campana*, the CJEU held that educational benefits for vocational schemes (under ALMPs), which either aim to facilitate the transition from unemployment to employment or the worker to keep its current job, are also brought under the category of unemployment benefits.[268] These rulings are crucial as the CJEU widened the scope of unemployment benefits and included educational benefits that would enable the individuals to secure their job or enter/re-enter/remain in the labour market.

Family benefits

The coordination of family benefits could facilitate the transition of workers with family responsibilities in the EU labour market as the worker would be able to move in another Member State for work and ensure that his/her family (primarily spouse and children) will be granted the appropriate benefits. In the absence of granting appropriate family benefits, workers could be more reluctant in making the transition in the EU labour market. The case-law of the CJEU shows that there are problems regarding family benefits as to the terminological interpretation and the scope of family benefits as determined in Regulation 883/2004. According to article 1(z) of Regulation 883/2004, family benefit is described as 'all benefits in kind or in cash that aim to meet family expenses'.[269] It is clear that the scope of family benefit does not include 'maintenance payments and special childbirth and adoption allowances', which are set in the annex of Regulation 883/2004.[270] In this context, it is important to note that the Republic of Cyprus did not adopt any exclusions to article 1(z) of

[266] Ibid, article 65(2).
[267] Case C-346/05 *Monique Chateignier v Office national de l'emploi (ONEM)* [2006] ECR I-10951.
[268] Case C-102/91 *Doris Knoch v Bundesanstalt für Arbeit* [1992] ECR I-4341.
[269] Regulation 883/2004, article 1(z).
[270] Ibid.

Regulation 883/2004.[271] In the cases below, it is evident that the CJEU has an important role to play in determining family benefits, which as a consequence will enable the workers to retain their job, while securing the appropriate benefits during their absence from work for reasons related to family responsibilities.

In *Kerly Del Rosario Martinez Silva*, the CJEU examined whether ANF, which is a cash benefit that aims to meet family expenses, is included in the scope of 'family benefit' as prescribed in article 1(z) of Regulation 883/2004.[272] According to the domestic legislation (i.e. article 65 of Legge n.448) the ANF is paid to individuals that have at least three children and their income is no less than a certain barrier.[273] The CJEU stated that the family benefits, whose eligibility criteria are objective and are related to 'their size, income and capital resources', are included in Regulation 883/2004.[274] The CJEU further held that the ANF falls in the scope of 'family benefit' as prescribed in Regulation 883/2004.[275] This ruling, which integrates parental leave within the context of family responsibilities, ensures that parental leave norms as established in Parental Leave Directive are coordinated within the spectrum of the EU.

5.4.2 Non-discrimination and social security

The right to social security and social assistance, which is promoted under article 34 EUCFR, is entitled to everyone residing and moving legally within the EU.[276] However, as Jennifer Tooze stated, 'the implications of article 34 EUCFR for Member States and for EU law and policy more generally remains unclear'.[277] Social security and social insurance exist in the field of EU non-discrimination, which is described as 'just and adequate social security'.[278] Looking at the material scope of EU Equality Directives, it appears that Framework Directive 2000/78 does not prohibit direct or indirect discrimination in the field of social security or social assistance for reasons related to sexual orientation, disability, age, religion or belief. Race Directive 2000/43 and Recast Directive 2006/54 explicitly prohibit direct and indirect discrimination in relation to social protection: the first on the grounds of race and ethnicity

[271] Ibid, annex.
[272] Case C-449/16 *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS) and Comune di Genova* [2017] OJ C277/19; Case C-216/12 *Caisse nationale des prestations familiales v Fjola Hliddal* [2013] OJ C344/29, para.59; Case C-177/12 *Caisse nationale des prestations familiales v Salim Lachheb and Nadia Lachheb* [2013] OJ C367/10, para.39.
[273] Ibid (C-449/16), para.9.
[274] Ibid.
[275] Ibid, para.25.
[276] EUCFR, article 34.
[277] Tooze J.,'Social Security and Social Assistance' in Harvey T.K. and Kenner J. (eds) *Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart Publishing 2003), p.161.
[278] Ellis E. and Watson P., *EU Anti-Discrimination Law* (2nd edn, Oxford University Press 2012), p. 439.

(article 3(e) of Directive 2000/43) and the latter on the grounds of sex (article 5 of Directive 2006/54).[279] As Erica Howard articulated, EU non-discriminatory law is problematic because 'it creates an hierarchy of discriminatory grounds'.[280] This view remains a controversial issue because it shows that there is a divergence between transnational labour systems. On the one hand, the ICESCR and the ESC/RSC endorsed the universal approach of social rights, which are indivisible, inter-related and interdepended. Whereas, Directive 2000/78 does not seem to integrate substantive equality, because it seems that people that fall outside the scope of Directive 2000/78, cannot enjoy the right to social security in the prism of non-discrimination.

Directive 2000/43 provides an exception to non-discrimination rule in cases where the objective of the norm is legitimate, and the requirement is proportionate. Article 5 of Directive 2006/54 stipulates that discrimination on grounds of sex in occupational security schemes is prohibited.[281] This provision, which does not cover occupational security schemes on voluntary basis, is crucial as to the concept of flexicurity because it facilitates the workers to remain in the labour market. In other words, in cases where the worker needs leave for reasons related to maternity leave, paternity leave or adoption leave, the worker is able to retain the job and receive the appropriate social security benefit.

In particular, article 15 of Directive 2006/54 provides that a female worker, who is on maternity leave, shall be entitled to maternity benefit during her absence from work.[282] It is interesting that maternity leave Directive 92/85 stipulates that the Member States are responsible to provide the appropriate maternity benefit in accordance with domestic law or practice.[283] Directive 2006/54 also introduced a clause, according to which the Member State shall recognize paternity and/or adoption leave, through which the individual shall be entitled to appropriate social security benefits.[284] The fact that Directive 2006/54 gives the option to Member States to decide how they would like to implement paternity or adoption benefits, shows that the EU leaves a leeway to the Member States to develop their own social security systems in more sensitive areas.

In the Parental Leave Directive 2010/18, which is replaced by the new Directive on Work-Life Balance for Parents and Carers, the Member States or social actors are responsible to ensure

[279] Directive 2000/43, article 3(e).
[280] Howard E., 'The EU Race Directive: its symbolic value – its only value? (2004) 6 *International Journal of Discrimination and the Law* 141, p.141.
[281] Directive 2006/54, articles 5 and 8.
[282] Ibid, article 15.
[283] Directive 92/85, article 11(1).
[284] Directive 2006/54, article 16.

that the worker is entitled to receive social security benefits during the leave.[285] Workers that are protected under Directive 92/85 (i.e. mothers with biological children, pregnant women and women who are breastfeeding) are entitled to receive the adequate social benefit during their leave.[286] The term 'adequate' means that the benefit shall be at least equivalent to the income that the worker would have receive for medical reasons.[287] The Member States have the discretion to define the term 'adequate' and set conditions are prerequisite for maternity benefit.[288] The new Directive on Work-Life Balance for Parents and Carers, integrated the provision of Directive 2010/18 according to which social security protection in relation to parental leave shall be determined by the domestic legal systems.[289] Although, Directive 2010/18 explicitly sets out that the Member States shall consider 'the continuity' of social security schemes,[290] constituting a core aspect of the Directive.

The scope of Directive 2000/78, which promotes non-discrimination on the grounds of sexual orientation, religion, belief, disability and age, does not explicitly extend the protection in the area of social security schemes.[291] The limited scope of Directive 2000/78 could theoretically create problems in the facilitation of flexicurity (procedural) norms, because individuals could be excluded based on the aforementioned grounds. Nevertheless, the right to access vocational training (embracing the ALMPs), which could give the means to workers to retain their job/swiftly transition in the EU labour market, is clearly covered by Directive 2000/78.[292] In *J.J. de Lange*, the CJEU held that the right to full deductions of the vocational training costs on the basis of age shall be conceived as difference in treatment (reflecting article 3(1)(b) Directive 2000/78).[293] The taxation scheme for vocational training costs, which differs on grounds related to age, falls in the scope of Directive 2000/78 because it embraces the right to vocational training of young people.[294] The CJEU characteristically referred to the impact of income tax on accessing vocational training schemes as this would restrict individuals from participating in these schemes and as a consequence, they would not be able to remain in the labour market.[295] In other words, this case indirectly illustrates an inter-connection between

[285] Directive 2010/18, Annex, clause 5(5).
[286] Directive 92/85, article 11(2).
[287] Ibid, article 11(1).
[288] Ibid, articles 11(1) and 11(4).
[289] Directive 96/34, Annex, clause 2(8); Directive (…/2019) on Work-Life Balance for Parents and Carers, article 8; Directive 2010/78, article 8.
[290] Directive 2010/18, Annex, clause 5(5).
[291] Directive 2000/78, article 3(3).
[292] Ibid, article 3(1)(b).
[293] Case C-548/15 *J.J. de Lange v Staatssecretaris van Financiën* [2016] OJ C14/15.
[294] Ibid, para.22.
[295] Ibid, para.18.

employment security and educational benefits, which could be brought under the umbrella of social security system as part of ALMPs (i.e. a core flexicurity component).

The EU procedures for coordination of social security systems could be characterized as an extremely technical and complex type of regulation, through which different domestic social security systems use procedures of communication to ensure that workers can enjoy the freedom of movement. The EU regulates the inter-play of domestic actors regards to which body is competent to pay the benefit and which period shall be aggregated. However, it does not set out a baseline of norms because this, which could be contrary to the principle of conferral and subsidiarity, could be conceived as a threat to national sovereignty since social security systems reflect the different realities of domestic labour markets. It appears that the two other international standard-setting actors that are analysed in the research study (UN/ILO and CoE) do not embrace the concept of coordination, since they adopt norms to foster labour standards. Despite this normative divergence between the EU on the one hand and the UN, ILO and CoE on the other, the principle of non-discrimination is integrated in the foundations and roots of all the three systems, in which the systems are based to create procedural mechanisms that are adjusted to their internal aims. Even if the aims of the systems are different (for example, the EU aims to operate an internal market, whereas the ILO aims to promote decent jobs for all), the principle of non-discrimination is embraced in different contexts.

5.5 Reflexive Policy Mechanisms

This research study aims to conceptualize and gain an understanding of the relationship between regulation of employment security and social security systems, using a combination of hard-law and soft-law instruments. Since the previous sections explore the EU hard-law means of regulation, this section focuses on the EU reflexive mechanisms, which entail the production of norms in the two areas of employment and social policy that fall in supporting competences of the EU (article 5 TFEU). Section 5.5.1 explores the normative context of the European Employment Strategy (EES), which is used as indirect means for promotion of labour standards that integrate the concept of flexicurity. Furthermore, section 5.5.2 is focused on the Social OMC, which is also a voluntary procedure that entails participation of different domestic actors and attempts to influence the adoption of social security standards at domestic level.

5.5.1 European Employment Strategy (EES)

The EES, which is embedded in the Europe 2020 Agenda, constitutes a reflexive mechanism for deregulation and re-regulation of national employment policies.[296] The EES, using the Open Method of Coordination (OMC) as its policy-tool, facilitates the interaction of interested actors through indirect means of regulation. In the spectrum of EES, the set of goals for labour protection are developed at EU-level and the national actors, such as public authorities and social actors, choose the methods for implementation of EES at national level to converge the existing normative divergences. This section aims to analyse the normative contextual framework of the EES and explore to what extent the EES as a reflexive mechanism promotes employment security as embedded in the discourse of flexicurity. The normative analysis is focused on the four EES processes: The Integrated Employment Guidelines, the Joint Employment Report (JER), the National Reform Programmes (NRP) and the Country Specific Recommendations (CSR).

The Integrated Employment Guidelines of 2015, which set out the strategic aims for labour protection that shall be fulfilled at domestic level, seem to primarily focus on employability and social security protection.[297] The EC drafts the proposal of Integrated Employment Guidelines and the Council further adopts the Commission's proposal after consultations with the European Parliament.[298] The social actors may also participate in the drafting and implementing process of the Integrated Employment Guidelines.[299]

The concept of employment security, which means security in employment that is adjusted to employability and derives from the EU-oriented policy of flexicurity, appears in the contextual framework of the 2015 Integrated Employment Guidelines. The origins of flexicurity, which introduced this concept of employment security, stem from the Netherlands and Denmark, as explained in chapter 2 of this research project. The Common Flexicurity Principles, which are embedded in 2015 Integrated Employment Guideline 7, endorse the idea of employment security through an integrated strategy that balances flexibility and security. The idea of flexicurity, which entails internal flexicurity within the enterprise and external flexicurity,

[296] Council Decision 2014/322 of 6 May 2014 on guidelines for the employment policies of the Member States for 2014 [2014] OJ L165/49; Council Decision 2012/238 of 26 April 2012 on guidelines for the employment policies of the Member States [2012] OJ L119/47.
[297] European Commission, 'Proposal for a Council Decision on guidelines for the employment policies of the Member States' (2015) COM (2015) 98 final.
[298] TFEU, article 148.
[299] European Commission, 'Communication from the Commission: the European social dialogue, a force for innovation and change' (2002) COM (2002) 341 final.

promotes security of employment through swift transitions from one job (position) to another, while providing adequate social security protection through these transitions ('modern social security systems').[300] A swift transition to a new job (position) shall be achieved by promoting ALMPs and LLL, which would enable the individual to transition from one job to another job.[301] Even if employability (ALMPs and LLL) and social security protection ('modern social security systems') are promoted through the Integrated Guidelines, it does not necessarily mean that the integration of these flexicurity components in the 2015 Integrated Employment Guidelines can promote employment security (see sections 2.2.2 for further analysis on flexicurity components).[302]

The focus of the Integrated Employment Guidelines is on flexicurity components (i.e. ALMPs, LLL, generous unemployment benefits and flexible working arrangements) that were introduced in the 2007 Communication of Commission ('Towards Common Principles of Flexicurity') instead the over-arching aim of flexicurity to secure employment, while facilitating transitions in the labour market. In other words, the social actors adopt policies/laws to reach the sub-goals that are in line with the flexicurity components, however, the main goal of fostering employment security is lost. This is because the Integrated Employment Guidelines guide the Member States to adopt norms to attain the sub-targets of flexicurity components (such as to tackle unemployment and structural unemployment as part of 2015 Integrated Employment Guidelines 5-7 and combat social exclusion as part of 2015 Integrated Employment Guideline 8), without considering the over-arching aim of employment security (i.e. ensuring that the worker can remain in the labour market).[303] For example, if the Member State provides generous unemployment benefits as a measure to foster social security protection (2015 Integrated Guideline 8), this social security norm could increase inactivity levels (instead of facilitating the transition from one job to another and securing employment). This is because generous unemployment benefits could motivate the workers to reject job offers since they have secured an income and they do not feel the pressure to seek for a job.[304]

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[300] Council conclusions on the common principles of flexicurity (November 2007) SOC 476 ECOFIN 483 < https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015497%202007%20INIT> accessed 12 August 2019.
[301] Ibid.
[302] Ibid.
[303] Structural unemployment means 'a situation where there are people without work because they live in areas where jobs do not exist, or because they do not have the necessary skills for jobs that exist' - Cambridge dictionary <https://dictionary.cambridge.org/dictionary/english/structural-unemployment> accessed 12 August 2019.
[304] Funk L., 'European Flexicurity Policies: A Critical Assessment' (2008) 24(3) *International Journal of Comparative Labour Law and Industrial Relations* 349, pp.349-350.

The question that arises is to what extent the promotion of employment security as enshrined in the discourse of flexicurity of the Integrated Guidelines include job security norms. From the perspective of the EC, flexicurity policies shall 'shift from job security to employment security'.[305] The idea of flexicurity derives from the Kok Report of 2004, which sets out the need to focus on flexibility and security, although the Report does not use the terms 'employment security' and 'job security'.[306] These two terms, which are distinguishable as they describe two different concepts whose meaning is further analysed in section 2.3.1, are intimately interconnected. In some cases, the simultaneous reaction of employment security and job security norms can create tensions. For example, strict job security norms could have an adverse impact on employment security because employers might appear reluctant to recruit new workers as in case of termination of the employment at the initiative of the employer, employers could possibly have to pay a higher amount of severance pay and inform the worker about the dismissal in an extensively long period prior to the actual dismissal.[307] The Integrated Employment Guidelines of 2015 do not give any suggestions as to how job security norms could be embedded in the broader context of employment security.[308]

Frank Hendrickx articulated the view that 'employment security pushes away job security'.[309] The reflexivity of the EES, which includes flexicurity policies, could give the opportunity to the interested actors, such as the Government and trade unions, to balance their dynamics and mediate any occurring tensions between job security and employment security through deregulatory policies. The idea of flexicurity, which is embedded in the EES, implies 'a shift from employment law to employment policy', although the EES aims to foster labour protection through deregulation and re-regulation of national labour systems.[310] The OMC, which is the policy mechanism of the EES for mutual learning and peer pressure, can influence the creation of hard-law and soft-law norms.[311] It is an open question to what extent the Member State can learn from each other as each labour market has its own peculiarities and

[305] European Commission, Towards Common Principles of Flexicurity: More and better jobs through flexibility and security - Impact Assessment SEC (2007) 861 (EC 2007 Communication on Flexicurity).
[306] EU, Report form the High-Level Group chaired by Wim Kok, 'Facing the challenge: the Lisbon Strategy for growth and employment' (November 2004), p.33.
[307] Berglund T. and Furåker B., 'Flexicurity Institutions and Labour Market Mobility' (2011) 27(2) *International Journal of Comparative Labour Law and Industrial Relations* 111, p.113.
[308] Integrated Guidelines 2015.
[309] Hendrickx F., 'Flexicurity and the EU Approach to the Law on Dismissal' (2007) 14 *Tilburg Law Review* 90, p.90.
[310] Rönnmar M. and Numhauser-Henning, A. 'Swedish Employment Protection in Times of Flexicurity Policies and Economic Crisis' (2012) 28(4) *International Journal of Comparative Labour Law and Industrial Relations* 443, p.445.
[311] Funk (n.304), pp.349-350.

complexities that reflect the internal differentiation of law and to what extent the OMC effectively promotes the aims of the EES as it appears as 'not capable to generate the necessary commitment'.[312] The EES aims to facilitate the interaction of the interested actors and ease their conflicting dynamics or power imbalances through a reflexive process rather than allocating the specific tasks that each actor shall carry out. This process has the advantage of enabling the vested interests of the actors to be reflected in the regulation of employment, which could possibly be used as a method of regulation to create decent jobs rather than just tackle unemployment if it does not create binding obligations upon the Member States.

The EES using the OMC, cannot create obligations binding *per se* upon the Member States. For example, the Integrated Employment Guidelines tend to focus on the flexibility aspect of flexicurity because 'security is hampered by structural long-term unemployment and budget constraints'.[313] In doing so, they just prompt the Member States to 'make full use of the European Social Fund' (2015 of Integrated Employment Guideline 6), which is institutionalized in Regulation 1303/2013.[314] In addition to this, Decision 573/2014 of the EP and of the Council on enhanced cooperation between Public Employment Services (PES) establishes the network of PES, through which the EU ensures that PES still remain key actors in the regulation of employment norms. This Decision, which creates a platform for mutual learning among PES, does to describe which specific tasks shall be carried out by the PES.[315] In other words, the involvement of PES is institutionalized and confirmed through hard-law instruments. Nevertheless, the selection of other key actors (such as trade unions, experts) and the type of participation (e.g. exchange of information, consultation) could be determined though soft law means of regulation.

The focus of the EES on flexicurity components rather than on employment security (as an over-arching aim) is also illustrated in the following EES processes, which are used as means to govern the implementation of the EES: National Reform Programmes (NRP) and Country-Specific Recommendations (CSR). The NRP is a national report that describes the situation at domestic level. It is prepared by each Member State and submitted to the EC, which is

[312] Meardi G., 'Flexicurity Meets State Traditions' (2011) 27(3) *International Journal of Comparative Labour Law and Industrial Relations* 255, p.257; Hepple B., 'Dismissal Law in Context' (2012) 3 *European Labour Law Journal* 207, p.212.
[313] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 [2013] OJ L347/320; Meardi (n.310), p.256.
[314] Ibid.
[315] Decision 573/2014/EU of the European Parliament and of the Council of 15 May 2014 on enhanced cooperation between Public Employment Services (PES) Text with EEA relevance [2014] OJ L159/32.

responsible for coordination and evaluation of policies under the European Semester (Europe 2020 Agenda).[316] As a reflexive response to the NRP, the EC prepares CSR and gives suggestions to the Member States to ensure the level of implementation of Europe 2020 strategy. During the period that Cyprus was under the surveillance of Economic Adjustment Programme (2013-2016), which was agreed between the European Commission (EC), the European Central Bank (ECB), the International Monetary Fund (IMF) and the Government of Cyprus, Cyprus could not participate in the implementation procedures under Europe 2020 Strategy.[317]

For example, the 2017 NRP of Cyprus that is used as case study to this research project describes the schemes of the Human Resource Development Authority (HRDA) and their impact on employability, by giving an emphasis on blue skills and blue occupations.[318] The NRP fails to discuss the quality of jobs and to what extent job security norms facilitate the transition from one job (position) to another job (position), as it seems to solely focus on tackling unemployment. This means the focus remains on the quantity of offered jobs rather on their quality. This report is particularly interesting because the policies that aim to tackle unemployment may increase the levels of precariousness. This shows an imperfect communication between the systems, as the Republic of Cyprus tightly adjusted the national employment policies to the governmental agenda (i.e. to tackle unemployment) rather than embracing the concept of employment security, as conceived in the prism of flexicurity. In response to the 2017 NRP, the Council developed a set of Country-Specific Recommendations (CSR). This is particularly interesting because the CSR, which is used as means to regulate austerity management, focuses on enhancing economic development (i.e. economic stability and competitiveness) rather than fostering employment security and social security protection. The Recommendation 5 of 2017 CSR for Cyprus, which discusses the effectiveness of the ALMPs and the role of the Public Employment Services (PES), reflects the mind-set of the Integrated Employment Guidelines, which promote employability rather than employment security (in other words, fails to promote secure transitions to decent jobs). Regarding social security, the EC urges the Cypriot Government to adopt the appropriate legal framework and

[316] European Commission, Presidency Unit for Administrative Reform, National reform programme: Cyprus (April 2017) <https://ec.europa.eu/info/sites/info/files/2017-european-semester-national-reform-programme-cyprus-en.pdf> accessed 27 March 2019 (NRP Cyprus).
[317] Council of the European Union, 'Council issues country-specific recommendations on economic and employment policies (Brussels, July 2013), <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/137875.pdf> accessed 23 May 2019.
[318] NRP Cyprus (n.316), pp.41-42.

provide 'universal healthcare coverage' (Recommendation 5). As a general conclusion, Europe 2020 Strategy, which should have endorsed the normative framework of the UN 2030 Agenda for Sustainable Development, does not seem to promote the UN SDG 8 and promote decent jobs.[319]

Regarding flexicurity pathways, the EC suggested that the interested actors shall create their own national flexicurity pathway.[320] In this context, the EC Communication of 2007, after the EC undertook background research, sets out four flexicurity pathways that each Member State could use as examples or source of inspiration, and create their own flexicurity pathways.[321] The four main flexicurity pathways, from which the Member States could draw inspiration, are the following: a) tackle contractual segmentation, which entails flexibilization of job security norms; b) develop flexicurity within the enterprise and offer transition in the labour market embracing (as form of internal flexicurity and job security); c) tackle skill and opportunity gaps among the workforce by fostering employment security in the broader context; and d) improve opportunities for benefit recipients and informally employed workers by fostering income security and facilitating transitions in the labour market.[322]

In the Joint Employment Report (JER), which is used as a mutual learning tool, the Council and the EC describe the best and worst practices of implementation of the Integrated Employment Guidelines at domestic level.[323] In the 2017 JER, the Council and the EC identified the Member States which successfully integrated job security norms in the context of employment security through flexible contractual arrangements, social security protection and ALMPs and managed to overcome the adverse effects of economic distress.[324] In doing so, the JER of 2017 referred to the link between effective health systems, which facilitate the return to the labour market for workers with family responsibilities.[325] The 2017 JER referred to medicines cost, however, it failed to flag up the issue of cost-sharing of social security benefits that would enable the worker to secure a benefit during medical leave.[326] The 2017

[319] European Commission, 'Next steps for a sustainable European future European action for sustainability (Strasbourg, 22.11.2016) COM (2016) 739 final, p.6.
[320] EC 2007 Communication on Flexicurity (n.305).
[321] Ibid.
[322] Ibid.
[323] TFEU, article 148.
[324] Ibid; European Commission and EPSCO Council, 'Joint Employment Report 2017 from the Commission and the Council accompanying the Communication from the Commission on the Annual Growth Survey 2017' (2017) <file:///C:/Users/ca13086/Chrome%20Local%20Downloads/JER%20with%20cover%20(2).pdf> accessed 28 December 2017, p.7., para.5.
[325] Ibid (EC and EPSCO Council 2017), p.7.
[326] Ibid.

JER also discussed about the achievements in the Cypriot labour market, such as the continuing decline in the rate of unemployment and youth-unemployment.[327] The 2017 JER arrived at a general conclusion, according to which Cyprus faces major employment and social challenges. For example, the rate of people, who are at-risk of poverty, has been increased tremendously.[328] As a policy response to Guideline 5, Cyprus adopted policies to foster participation in the labour market, which made workers more adaptable to the needs of the labour market. For example, the Government of Cyprus launched vocational and training schemes for categories of workers that are currently facing a higher risk of unemployment.[329] These categories include unemployed individuals under 25 years old and people with disabilities.[330]

EES and social dialogue

In Lisbon Presidency Conclusions (2005), the social partners were called to play a dynamic role in the implementation of the Employment Guidelines.[331] The 2015 Integrated Employment Guidelines called social actors to play a major role in the creation of national employment policies, taking the form of collective bargaining or other social dialogue forms. It is a matter of question why the European social actors have not prepared a similar report as to 2004 Report on social partner actions in Member States to implement Employment Guidelines, which could be used as mutual learning tool and an alternative means of communication (reporting). The participation of social actors in the EES is crucial as social actors can have impact on the formalization of norms, either as soft-law norms or hard-law norms after close cooperation with national parliaments. The involvement of public authorities in the regulation of employment norms depends on their political willingness and commitment to take part in the social dialogue and contribute to the realization of norms.

The role of social dialogue reflects the link between producing framework agreements, and the EES. The EU social actors can initiate EU-level negotiations under article 156 TFEU. These negotiations could lead to conclusion of an agreement that either will be implemented at domestic level by national social actors or annexed to a legislative proposal under articles 154-155 TFEU. The former procedure was followed for the adoption of Parental leave Directive 2010/18 (replaced by the new Directive on Work-Life Balance for Parents and Carers), which

[327] Ibid.
[328] Ibid.
[329] RDAUTH, <http://www.hrdauth.org.cy/el/katartisi/anergoineoeiserxomenoi> [only available in Greek] accessed 23 May 2019.
[330] Ibid.
[331] Lisbon Presidency Conclusions (23-24 March 2000), para.28.

is further analysed in section 5.3.2. An example of autonomous negotiations is the 2010 Framework Agreement on Inclusive Labour Markets. The follow-up to this Agreement, the European social actors (UEAPME, CEEP, BusinessEurope and Syndicat Europeaen Trade Union) prepare a yearly joint table and describe the actions of social actors at domestic level.[332] According to the 2013 report, the Cypriot Social Partners did not manage to adopt the appropriate legal framework, which would complement the Framework Agreement on Inclusive Labour Markets.[333]

The European social actors participated in the debate of 'flexicurity' and defined the concept of 'flexicurity' as 'flexibility combined with employment security'.[334] In the 2007 Joint Declaration of Eurociett and Uni-Europe, the social actors set out good and bad examples of national flexicurity pathways.[335] An example of a good practice that was indicated, was the vocational training and education funding for temporary workers from national authorities and social actors, whereas a bad practice constitute the access to limited social benefits for temporary workers.[336] The European social actors can also play a role in facilitating the communication between the EU and other transnational labour systems. The Joint Declaration of Eurociett and Uni-Europe is an example of how European social actors referred to ILO norms (such as ILO Convention N.181) to assess whether national flexicurity policies constitute a good/bad practice.[337]

The preparation of the NRP and JER could be characterized as 'bureaucratic' procedures, because the reports are entirely prepared by the governmental authorities since the other social actors are not aware of how this process works.[338] The question that arises is why the governmental authorities have not used this procedure more to engage social actors in a constructive dialogue, as a platform to share their opinions and express their concerns. The reasons behind the transition of this procedure from a reflexive process to a 'dead process' could be various. For example, the governmental authorities might not believe in the positive

[332] European Commission, Implementation of the ETUC/BUSINESSEUROPE/UEAPME/CEEP Framework Agreement on Inclusive Labour Markets (2014) <https://www.businesseurope.eu/sites/buseur/files/media/imported/2015-00260-E.pdf> accessed 10 August 2019.
[333] Ibid.
[334] Eurocieett, Europa, 'Joint Declaration within the framework of the 'Flexicurity debate' as launched and defined by the EU Commission (28 February 2007) (Eurociett 2007), p.1.
[335] Ibid.
[336] European Commission, Commission staff working document, COM (2016) 2472 final.
[337] Eurocieett 2007 (n.334), p.7.
[338] Christiana Cleridou, 'Female voices in hard and soft law: the case of equal pay in Cyprus' (PhD Thesis, University of Bristol 2017), p.237.

outcomes of this procedure or the governmental authorities might want to hide or obscure some negative aspects of their internal labour market that could be problematic.

Social dialogue in the context of the EES could take different forms, such as negotiations and consultations, that could be used as a mutual learning tool or lead to contractual relations. The broad range of the forms that social dialogue may take as part of the EES differs from the information and consultation procedures provided for economic dismissals (as analysed in section 5.3). Philippe de Bucke and Maxime Cerutti observed that European social dialogue in the EES 'seem[s] to function well' at European-level, however social dialogue at domestic-level seems problematic.[339] As they explained, domestic social actors are not always engaged in the preparation of national reports as part of the EES.[340] Whereas, the procedures for negotiation and consultation on economic dismissals are regulated at company-level. It is important to note these forms of social dialogue do not encompass the stronger form of collective bargaining, including a right to strike. This means that the bargaining (and persuasive) power of social partners is accordingly very limited in this context, as it is arguably in the case of economic dismissals, which takes the form of information and consultations.

5.5.2 Social OMC

The Social OMC, which evolved from the Lisbon Agenda, aims to enhance social security protection in the EU regime. This section explains how the Social OMC could have an impact on the creation of social security standards, entailing cooperation of the key actors, which could fill the normative gap that exist in the EU hard law that are solely focused on the coordination of social security systems and non-discrimination. Since this research project deals with the relationship of employment security and social security in the spectrum of flexicurity, this section examines to what extent the Social OMC manages to influence the creation of minimum social security standards, while facilitating the transition of workers in the labour market.

The Social OMC focuses on the four pillars of poverty and social exclusion, health care, long-term care and pensions.[341] In the 'Social Protection Performance Monitor (SPPM) – methodological report', the Indicators Sub-group of the Social Protection Committee set out a wide range of indicators to assess to what extent countries managed to improve social security

[339] Buck d. P. and Cerutti M., 'Social Dialogue: Why it matters?' in Vandenbroucke F., Barnard C., De Baere G. (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017), p.225.
[340] Ibid.
[341] EU official website (Social OMC), < http://ec.europa.eu/social/main.jsp?langId=en&catId=1063> accessed 20 April 2019.

protection at domestic level.[342] Although the Committee was willing to strengthen its relationship with the Member States and exchange data though preparation of National Country Profiles, it appears that Cyprus was not involved in this process, which was launched in 2012.

The overarching aim of the Social OMC appears to be the 'mutual interaction between the Lisbon objectives',[343] which shows that distinct areas of EU policies could be interconnected. In the Social OMC, the EC emphasized how important is the participation of all stakeholders in the development, implementation and monitoring of the policies.[344] In addition to this, the 2017 consultation document on the European Pillar of Social Rights, the European social actors discussed the deficiencies in accessing social protection, which could make more difficult the transition from one job to another.[345] This report, which explains the reasons that caused this problem (such as globalization and regulatory deficiencies), describes the branches of social security along with the legal requirements to have access to these social security benefits.[346]

In the spectrum of the Social OMC, the EU manages to facilitate the communication of different actors and influence the creation of standards at the domestic level. One of the most recent achievements of the Social OMC is the establishment of the European Labour Authority (ELA), which will be launched in 2019, to provide information to citizens and business about employment opportunities and vocational training schemes and their rights if they exercise their right to move and work in another Member State.[347] It will also facilitate the exchange of information between the national actors, which will ease the transitions of EU citizens and ensure access of social security protection.[348]

Regarding the health care, the Social Protection Committee's Opinion (2016) sets out principles and suggestions that should be taken into account to tackle health inequalities, which

[342] EU official website (SPC National Report), < http://ec.europa.eu/social/keyDocuments.jsp?pager.offset=40&&langId=en&mode=advancedSubmit&policyArea=750&subCategory=758&year=0&country=0&type=0&advSearchKey=SPCNationalSocialReport> accessed 27 December 2018.
[343] Ibid.
[344] Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion' (2008) COM (2008) 418 final, annex.
[345] European Commission, Consultation document on the European Pillar of Social Rights (2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1457706909489&uri=COM:2016:127:FIN> accessed 13 August 2019, p.26.
[346] Ibid, annex 1.
[347] EU Official website, < http://ec.europa.eu/social/main.jsp?langId=en&catId=792&newsId=9061&furtherNews=yes> accessed 20 April 2018.
[348] Ibid.

remains a key issue for social inclusion – for example, ensure coordination at national level.[349] This opinion shows the broad scope of the Social OMC, which just flags up the problematic dimensions and gives general suggestions to the Member States that need to be adjusted appropriately by the domestic actors. In other words, it appears that it would be unrealistic to argue that the Social OMC could fill the EU's deficit, according to which hard law means of regulation do not set a baseline of social security standards.

In the case of Cyprus, the preparation of national reports (Cyprus National Social Report) is again a governmental procedure since the report is prepared by 'all the pertinent Ministries and Authorities' as it is set out in the Report itself.[350] The Report (NSR), which complements the NRP solely focuses on the description of the current legislation rather than on the current challenges of the domestic social security system. This seems to be a common practice that is also followed by the Cypriot governmental authorities in the preparation of the NRP in the context of EES. This shows that reflexivity does not only entail procedures but also the willingness of the different actors to participate in these procedures.

5.6 Concluding Remarks

The EU constitutes a procedural reflexive device that promotes the operation of the internal market, while integrating the core aims of equality and non-discrimination in its transnational regulation. The EU, which is conceived as an autopoietic system from a reflexive law perspective, remains constrained by its functionally closed nature to preserve its market-based interests. However, it has showed an increasing appreciation of the need to achieve wider social objectives throughout the years, such as fostering employment security and social security protection, and facilitating the exchange of information with its external environment, reflecting its cognitively open nature. This has led to major procedural and substantive (normative) changes within the system of the EU. One of these core changes entails the shift

[349] European Social Committee, SPC Opinion 'Solidarity in Health: Reducing health inequalities in the EU' (2010) SPC/2010/5/4 final.
[350] Cyprus National Social Report (April 2014) <ec.europa.eu/social/BlobServlet?docId=11769&langId=en> accessed 15 May 2019, p.3.

from regulation using EU hard-law means of regulation (such as Directives and Regulations) to regulation/re-regulation using a combination of hard-law and soft-law means of regulation.

The EU hard law means of regulation seems to be more powerful compared to that of the ILO and the CoE. The ILO, known as the key standard-setting actor for the promotion of decent jobs, barely manages to transmit the international standards adopted due to low rates of ratification of Conventions and very weak supervision mechanisms (such as the CEACR). Regarding the CoE, the ECtHR manages to detect the infringement of rights (article 6 ECHR) and awards compensation to the applicants, however it seldom manages to prompt the Member States to change their normative legal framework. Similarly, the ECSR is based on a deliberative process (reporting and follow-up conclusion) and the lodging of collective complaints requires the fulfilment of many technical criteria (e.g. specific groups can lodge a complaint). As a result, the ECSR does not often exercise enough pressure on Member States to change the problematic national legal provisions.

The regulation of employment security norms, as developed in the EU regime, fulfils two different systemic aims: firstly, the principle of non-discrimination (dignity-related) and secondly, the facilitation of procedures in the event of economic dismissals. The employment security regulation that is related to human dignity and non-discrimination, which are two principles that exist in all the four systems of this research study (UN/ILO, CoE, EU, Constitution of Cyprus), promotes the prohibition of dismissals for reasons related to discriminatory grounds. Even if the ILO and the CoE promote employment security in the field of non-discrimination from a holistic human rights approach (i.e. prohibition against an improper discriminatory ground), the EU regulation, which is achieved through various dispersed hard-law instruments, marked a normative shift.

The regulation of employment security in the event of economic dismissals could be characterized as 'procedural law' because the EU hard-law instruments established procedures to facilitate transitions of workers in the EU labour market. The CJEU has also played a key role in interpreting the four substantive elements of 'collective dismissals', which appears as a normative gap as to the detailed contextual framework. However, the actual severance pay is not regulated at EU-level, which means its determination is entirely left at the discretion of the Member State.

EU norms are tightly linked to the functionally closed nature of the system, while respecting the principles of conferral and subsidiarity. Regarding social security regulation, the EU

showed its willingness to facilitate procedures, which are primarily focused on the inter-play of actors in the payment of social security benefits. In other words, EU regulation does not set a normative baseline of social security benefits. In comparison, the ILO and CoE provide detailed norms for social security protection. The question that arises is to how Cyprus has drawn on these different transnational social security regulations at domestic level – in other words, whether Cyprus has managed to integrate these technical procedures in the holistic approach of human rights as promoted by the ILO and CoE.

The principle of equality and non-discrimination, which is one of the core EU principles, is also embedded in the social security regulation that aims to ensure that EU citizens/workers can have access to social security benefits and are not excluded from social security protection. However, the EU system is once again constrained by its internal functional closed nature. Firstly, EU social security regulation is tightly linked to the concept of 'residence and nationality' and unemployed individuals can remain in another Member State only for maximum three to six months. In addition, the EU legal norms do not regulate the level of medical benefit and cost-sharing, whereas ILO Convention N.130 states that the Member State shall ensure that workers will be able to maintain, restore and improve their health so that they will be able to retain their job.[351] This reflects the normative divergence between the two systems. In this context, it is also interesting the Cypriot MoU of 2012 prompted the Member State to adopt National Health Services (NHS), as it is explained in the next chapter.

The Social OMC and the European Pillar of Social Rights attempt to offer a normative framework for social security protection. The shift from hard-law to a combination of hard-law and soft-law regulation has two advantages for the operation of EU: firstly, it gives a response to the criticisms that the EU focuses too much on market-oriented interests and secondly, it facilitates the communication between different actors to increase protection in the social security regulation (in particular, in areas of law that do not fall within EU absolute or shared competences).

The EES has the potential to become a reflexive procedure that enables many social actors to participate in the creation of norms. However, this has not yet been achieved. Instead, there is a 'dry' bureaucratic process, which not only does not harmonize labour and social security policies, but also barely manages to ameliorate the normative divergences between the systems. It seems the role of EU social actors in this context is very limited. They have adopted just one

[351] ILO Convention N.130, article 9.

autonomous framework agreement since 2010 for Inclusive Labour Markets to increase the level of protection.[352] The EU-policy oriented concept of flexicurity that was clearly embedded in the EES, was also integrated in the ILO regime that was adjusted to the normative framework of decent work (i.e. promotion of employment security as international standard). It appears that the EES procedures are tailored and focused on the four components of flexicurity (ALMPs, LLL, social security protection, and flexible contractual arrangements), but the over-arching goal of flexicurity to increase employment security is lost. This has led to a shift of the EES from employment security to employability. Finally, it is worth noting that Cyprus was excluded from the reporting procedure under the EES[353] during the economic adjustment programme. This regulation of employment security in the era of European financial crisis, which might give the impression that economic interests could have been prioritized over employment and other social interests, will be analysed in more depth in chapter 6.

[352] BusinessEurope, ETUC/CES, UEAPME, CEEP 'Framework Agreement for Inclusive Markets' (25 March 2010) <http://ec.europa.eu/employment_social/2010againstpoverty/export/sites/default/downloads/Events/event_123_Framework_agreement_ILM_25.03.10.pdf> accessed 23 May 2019.

[353] Regulation No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1, article 12.

Chapter 6: The Case of Cyprus

6.1 Introduction

Chapter 6 is focused on the case study of the Republic of Cyprus ('Cyprus'). This chapter identifies the strong capacity of the Cypriot legal system to self-regulate its own norms, while being cognitively open to learning from other transnational legal systems. Cyprus, which proclaimed its independence on 16 August 1960 after the Zurich-London Agreements, became a Member State of the transnational legal systems that were discussed in the previous chapters: the UN (1960),[1] the ILO (1960),[2] the CoE (1961)[3] and the EU (2004).[4] The legal system of Cyprus, which is a common-law monistic system,[5] is described as a 'mixed legal system'.[6] This means that public law endorses civil law traditions, whereas private law is regulated through common law, reflecting the impact of the British colonial rule that lasted in Cyprus since 1960.[7]

The reasons for choosing Cyprus as case study for this research project (which were previously set out in Chapter 1, p.2) are the following. First, I have a strong personal bond with Cyprus as I originally come from Cyprus and I studied the Cypriot legal system during my undergraduate studies at University of Cyprus. Second, I have a personal interest to gain an understanding of the contemporary implications on the Cypriot system – i.e. the conceptualization of employment security, the interaction of employment security with social security system, while evaluating to what extent the aim of the Cypriot legal system is shifted from employability to employment security. In the process of collecting and analysing material

[1] London-Zurich Agreements of 1959 between the Governments of Greece, Turkey, the United Kingdom of Great Britain and Northern Ireland (adopted 19 February 1959); UN official website <http://www.un.org/en/member-states/> accessed 27 July 2018.
[2] ILO official website, membership <http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:103070> accessed 27 July 2018.
[3] Ratification Law 39/1962, access <http://www.cylaw.org/nomoi/arith/1962_1_039.pdf> (available in Greek); Council of Europe official website, <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3> accessed 13 July 2019.
[4] Fifth Amendment of 2006 (127(I)/2006) amended articles 1A, 11(2), 140, 169(3) and 179 of the Constitution, to facilitate the endorsement of EU legal framework at domestic level.
[5] Constitution of Cyprus of 6 April 1960, article 52; Even if the legal system of Cyprus is monistic, it requires ratification and publication of the ratification law in the Gazette (i.e. the official newspaper of the Government of Cyprus).
[6] Hatzimihail N., 'Cyprus as a mixed legal system' (2013) 6(1) *Journal of Civil Law Studies* 37, p.1.
[7] Ibid, p.2.

for this chapter, I faced a key challenge. Cypriot primary legal instruments (including judicial decisions and laws) had to be translated from Greek (the language that were produced) to English language for the purpose of this study. It seems that translating a legal document from one language to another is not an easy task because each legal system develops its unique legal language, which has a very distinctive quality. I have identified my translations and where there is no exact parallel in English.

The economic crisis in Cyprus 'was mainly a banking crisis' as characterized by Gikas Hardouvelis and Ioannis Gkionis,[8] however, it caused adverse and spill-over effects in the areas of employment and social security protection. As Cyprus gradually and robustly exits its financial crisis, the rate of unemployment fell sharply from 16.9% in October 2013 to 7.1% in February 2019.[9] Whereas, the at-risk of poverty rate in Cyprus, which was slightly reduced from 28.9% in 2015, remains steady at high levels, as the rate reached 25,1% in 2017.[10] In this new post-crisis era, the Cypriot labour market is currently facing multiple challenges, which includes: unemployment and poverty (as discussed above); demographic changes due to very low fertility rates[11] and sharp increase in the ageing population;[12] the unresolved Cyprus dispute (also known as Cyprus conflict);[13] and the migrant and refugee crisis.[14] In Chapter 1 (p.1), I posed the following question: how the transformation of Cypriot legal system can provide a sustainable recovery, ensuring that workers can swiftly make transitions in the labour market (that is, enter, remain or re-enter the labour market) without being exposed to the risk of unemployment and a 'race to the bottom' in terms and conditions of employment. In this chapter, I will seek to understand to the preservation by Cypriot courts of job security and to what extent Cypriot government made a shift to employment security.

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[8] Hardouvelis G. K. and Gkionis I., 'A Decade Long Economic Crisis: Cyprus versus Greece' (2016) 10(2) *Cyprus Economic Policy Review* 3, <https://www.ucy.ac.cy/erc/documents/Hardouvelis_Gkonis_3-40.pdf> accessed 9 July 2019, p.11.

[9] Eurostat statistics, <https://www.google.com/publicdata/explore?ds=z8o7pt6rd5uqa6_&met_y=unemployment_rate&idim=country:cy:mt:el&fdim_y=seasonality:sa&hl=en&dl=en> accessed 9 July 2019.

[10] Eurostat official website, < <https://ec.europa.eu/eurostat/databrowser/view/t2020_50/default/table?lang=en> accessed 9 July 2019.

[11] Republic of Cyprus, Ministry of Finance, 'Woman in Cyprus in Figures' (published 7 March 2017), < http://www.cystat.gov.cy/mof/cystat/statistics.nsf/All/73F947E6E0470DD2C22580D80037BA90/$file/Woman_in_CY-EN-070317.doc?OpenElement> accessed 13 July 2019.

[12] Eurostat official website, <https://ec.europa.eu/eurostat/statistics-explained/index.php/People_in_the_EU_-_statistics_on_an_ageing_society> accessed 12 July 2019; Koutsampelas C., 'Aspects of Elderly Poverty in Cyprus' (2012) 6(1) *Cyprus Economic Policy Review* 69.

[13] See more details about Cyprus dispute at <http://www.uncyprustalks.org/> accessed 13 July 2019.

[14] See more details about the effects of migrant crisis in Cyprus at <https://www.unhcr.org/cy/wp-content/uploads/sites/41/2019/05/Cyprus-Fact-Sheet_updated_MAY2019.pdf> accessed 13 July 2019.

This Chapter examines the legal regulatory framework that is applied in the areas that are effectively controlled by the Republic of Cyprus. This means it does not cover the British Sovereign Areas (SBAs), which are governed by the UK,[15] and the Turkish-occupied area, where the application of national laws (including EU *acquis*) is suspended.[16] This suspension, which will be lifted after a solution of the so-called Cyprus dispute, does not affect the rights of Turkish-Cypriots and enclaved Greek-Cypriots[17] that reside in the Turkish-occupied area. Turkish-Cypriots and enclaved Greek-Cypriots are considered as national and EU citizens and they are eligible to enjoy the same rights with Greek-Cypriots or Turkish-Cypriots that reside in the non-occupied area.

This chapter is composed of four core sections. Section 6.2 sets the contextual framework for the Cypriot legal system, with focus on labour and social security regulation. Section 6.2.1 provides an outline of the sources of law, whereas section 6.2.2 provides a terminological analysis of the term 'employee' and 'salaried worker' as developed in the Cypriot context. Section 6.2.3 sets out an overview of the Economic Adjustment Programme and the Post-Surveillance Programme, which were concluded between Cyprus and the so-called 'Troika' (IMF/EC/ECB). Section 6.3 is focused on the forms of social dialogue at Cypriot level and the Industrial Relations Code. Section 6.4 examines the regulation of employment security, which shows the strong Cypriot Courts' approach over job security. Section 6.5 provides insights on the Cypriot regulation of social security, which is composed of social insurance and social assistance.

6.2 Cypriot legal system

This section sets the contextual framework of the Cypriot legal system for the analysis that will be followed in the rest of Chapter 6. Section 6.2.1 provides insights over the relevant

[15] Guarantee Treaty, United Kingdom Treaty Series No 4 (1961) Cmnd. 1252; Protocol 3 to the 2003 Act of Accession on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland. The Treaty of Establishment and Guarantee (1960), which was signed between the UK, Greece, Turkey and Cyprus to proclaim the independence of the Republic of Cyprus, established the British Sovereign Areas (SBAs) in Dhekelia and Akrotiri.

[16] Protocol 10 of the Treaty for the Accession, Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded [2003] OJ L236/955, article 1.

[17] See more details about enclaved Greek-Cypriots at <http://www.kypros.org/CyprusPanel/cyprus/enclaved.html> accessed 9 July 2019.

international, regional (European) and national sources of law, which regulate legal standards for employment security and social security at domestic level. The second sub-section explores the concepts of 'employee', 'worker' and 'independent contractor' in the Cypriot context. The reason of providing this terminological analysis is to gain a better understanding of the scope of workers, who are covered by the Cypriot labour law protection, which sometimes differs from the scope of individuals that are covered under social security protection. As Achilles Emilianides and Christina Ioannou observed: 'the relationship [of labour, welfare and social insurance] should not be overestimated; whereas … the structure of labour legislation is altogether different from welfare and social insurance legislation'.[18] For example, the employment standards for public and semi-public employees are regulated by administrative law, which is based on civil law traditions. Whereas, labour protections for 'employees', a term that is defined on a case-by-case basis by the Cypriot Courts (as explained in section 6.2.2), is governed by private law, which mainly endorses common-law principles. Before the next section, I also outline the background framework of the financial crisis in Cyprus, with focus on the Economic Adjustment Programme (2013-2016) and the Post-Surveillance Programme (2016-onwards).

6.2.1 Sources of law: employment security and social security

This sub-section provides an overview of the sources of law, which regulate employment security and social security standards in the Cypriot regime. The Cypriot labour legal standards are heavily based on English common law and equity principles, which are in conformity with the Constitution of Cyprus.[19] These principles are used by the Cypriot Courts as a core source of law in judicial reasoning.[20] Nevertheless, the strong desire of the Republic of Cyprus to become a Member State of the other transnational regulatory systems, whose binding legal treaties or agreements take precedence over the national laws,[21] does not necessarily mean that Cyprus has ratified all ILO and CoE instruments that are related to this study (or implemented these). For this purpose, this sub-section provides a brief overview of the adopted instruments. It is important to note that this sub-section does not refer to the EU hard-law instruments, which are extensively analysed in chapter 5 and sections 6.4 and 6.5. The reason for this is because

[18] Emilianides A. and Ioannou C., *Labour Law in Cyprus* (Wolters Kluwer International: the Netherlands 2018), p.31.
[19] Constitution of Cyprus, article 29(1)(γ).
[20] For example, the Supreme Court of Cyprus (SCC) in *Elbee Co. v. Efstathiou*, adopted common law principles, that were developed by the UK Appeal Court in the *Western Excavating (ECC) Ltd. v. Sharp* case, to define the concept of 'constructive dismissal'.
[21] Constitution of Cyprus, article 169.

when the Republic of Cyprus ratified the Treaty of Accession to the EU (2004), it has accepted to be bound by all EU binding legal acts (article 288 TFEU).[22]

Constitution of Cyprus

The Constitution of Cyprus of 1960 is the supreme law of Cyprus.[23] Part II of the Constitution sets out an extensive list of fundamental rights and liberties, which contains foundational provisions (i.e. provisions that cannot be amended),[24] that are related to this research study. Article 25 of the Constitution safeguards the right to practice any profession or to carry on any occupation, trade or business.[25] It is remarkable that the Constitution of Cyprus does not refer to 'the right to work', as safeguarded in the ICESCR and the ESC/RSC. Instead, article 25 of the Constitution refers to the free choice of employment, which is a constituent part of the normative content of the right to work. As Collins articulated, the right to work has an imprecise meaning and consists of many dimensions.[26] It seems that article 25 of the Constitution includes the positive/negative duties of the State to ensure that the individual has 'the right to pursue an occupation of his or her choice without unjustified restrictions or discrimination', which is also guaranteed in the EUCFR.[27] However, it does not encompass other aspects of the right to work, such as the right to decent work, or the right to just conditions of employment.[28] It is interesting that article 9 of the Constitution, which guarantees the right to social security, makes an explicit link of 'decent existence' (a concept strongly promoted by the ILO) and social security.[29] In particular, article 9 safeguards the right to a decent existence and social security, which includes workers' protection, assistance to the poor and social insurance system.[30]

Article 28 of the Constitution further provides the right to equal treatment and protection before the law, which integrates the principle of equality as one of the core values that could converge transnational and national systems. Article 28 includes the prohibition of direct or indirect discrimination on 'grounds of his community, race, religion, language, sex, political or other

[22] TFEU, article 288; Treaty of Accession to the EU.
[23] Constitution of Cyprus, article 179.
[24] Ibid, article 182 and appendix.
[25] Constitution of Cyprus, article 25.
[26] Mantouvalou V. (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2017), pp.18-19.
[27] Ibid, p.21
[28] Ibid, p.19.
[29] Constitution of Cyprus, article 9.
[30] Constitution of Cyprus, article 9.

convictions, national or social descent, birth, colour, wealth, social class, or on any ground'.[31] The open clause of 'any ground' leaves room for Cyprus to extend the prescribed list. For example, discrimination in the grounds of age, sexual orientation and disability is prohibited by Law 205(I)/2002 (implementing Directive 2000/78). Furthermore, since the Constitution based its foundations on the existence of two communities (Greek-Cypriot and Turkish-Cypriot community),[32] it safeguards the right to non-discrimination against any of 'the two Communities, any person as person or by virtue for being member of one of the two Communities'(article 6 of the Constitution).[33]

Last but not least, the Constitution safeguards rights that fall in the substantive provisions of the ECHR (articles 8-11), which could have implications on job security or social security standards as explained in chapter 4 (pp.81-86 and 92-94).

Cyprus and UN/ILO instruments

The Republic of Cyprus ratified the key UN human rights instruments that guarantee labour and social security rights (as discussed in chapter 3): ICESCR,[34] CEDAW,[35] CRPD,[36] Optional Protocol of CRPD,[37] and CERD.[38] However, it has only ratified a limited number of the ILO Conventions and Protocols (i.e. fifty-seven ILO Conventions and four Protocols), of which only fifty-one Conventions are still in force.[39] The ILO Conventions, which were ratified by the Republic of Cyprus, include: the eight fundamental ILO Conventions (e.g. ILO Discrimination Convention N.111,[40] ILO Conventions N.87[41] and N.98[42] on the right to organize and freedom of association), the Termination of Employment Convention N.158,[43]

[31] Ibid, article 28.
[32] Ibid, article 2.
[33] Constitution of Cyprus, article 6.
[34] Law 14/1969 (ratified by Cyprus 2 April 1969).
[35] Law 78/1985 (accessed by Cyprus 23 July 1985).
[36] Law 8(III)/2011 (ratified by Cyprus 27 June 2011).
[37] Law 8(III)/2011 (ratified by Cyprus 3 May 2008).
[38] Laws 12/1967 and 28(III)/1999 (ratified by Cyprus 21 April 1967).
[39] ILO official website, <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103070> accessed 13 July 2019.
[40] Law 3/1968 (ratified by Cyprus 2 February 1968).
[41] Law 17/1966 (ratified by Cyprus 24 May 1966).
[42] Law 18/1966 (ratified by Cyprus 24 May 1966)
[43] Law 45/1985 (ratified by Cyprus 5 July 1985).

ILO Convention N.102 and other specialized social security Conventions (ILO Conventions N.121 and N.128).[44]

In other words, Cyprus showed its cognitively open nature by implementing the UN rights-based framework to respect, protect and fulfil the right to work and the right to social security. Whereas, the Cypriot State appeared reluctant to adopt the normative content of these human rights as set in the ILO Conventions, reflecting its functionally closed nature. This complex nature of the Cypriot system is especially illustrated in the social security context because: a) the Republic of Cyprus failed to ratify the whole text of ILO Convention N.102 in its entirety;[45] and b) the Republic of Cyprus only ratified Part IV of ILO Convention N.128, which means it did not ratify and increase the set of standards for old-age and invalidity benefits.[46] Nevertheless, this reluctance does not seem to have caused any impact on the relationship between the ILO and Cyprus. As the current President of Cyprus, Mr. Nicos Anastasiades, stated in the ILO Centenary Conference (Geneva, June 2019): 'the already excellent cooperation between Cyprus and the Organization significantly strengthened following the economic crisis in 2013 with the ILO offering invaluable technical assistance, particularly through the actuary valuation of our social insurance scheme and on the issue of national minimum wage'.[47]

Cyprus and the CoE instruments

The Republic of Cyprus ratified the ECHR (and its first Protocol),[48] which mainly promotes civil and political rights, and the ESC[49] and its revised version (RSC),[50] which contain an extensive list of socio-economic rights.[51] As Cyprus accepted discrete provisions of the ESC/RSC, this should create concerns as to: a) the indivisibility of rights and b) the cognitively closed nature of the Cypriot legal system to implement the ESC/RSC in its entirety (social and economic rights). The provisions that the Republic of Cyprus failed to implement include: the

[44] Law 158/1991 (ratified by Cyprus 3 September 1991); Law 38/1966 (ratified by Cyprus 28 July 1966); Law 125/1968 (ratified by Cyprus 7 January 1969).
[45] ILO Conventions (n.39).
[46] Ibid.
[47] ILO official website, <https://ilo.cetc.stream/2019/06/11/address-by-h-e-mr-nicos-anastasiades-president-of-the-republic-of-cyprus/> accessed 13 July 2019, 10:10 – 10:42.
[48] Ratification Law 39/1962; Council of Europe official website, <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3> accessed 23 October 2018. The Treaty concerning the establishment of the Republic of Cyprus (16 August 1960), which was signed between the Governments of the UK, Greece, Turkey and Cyprus, set as an obligation for Cyprus to ratify the ECHR (1950) and the first Protocol (1952). Treaty concerning establishment of Cyprus, article 5.
[49] Laws 64/1967, 5/1975 and 203/1991 (ratified by Cyprus 7 March 1968).
[50] Law 27(III)/2000 and Law 17(III)/2011 (ratified by Cyprus 27 September 2000).
[51] Law 64/1967; Law 27(III)/2000.

right to dignity at work (article 21 RSC) and the right of workers with family responsibilities to enter, re-enter or remain in employment (article 27(1) RSC).[52]

Nevertheless, the Republic of Cyprus accepted the Collective Complaints Procedure (CCP).[53] However, Cyprus did not deposit a declaration to the Secretary General of the CoE to entitle national NGOs to lodge a complaint under the ESC/RSC against the Republic of Cyprus.[54] The non-deposition of a declaration could be one of the reasons that the ECSR had the chance to examine only two collective complaints against Cyprus, which dealt with the rights to work, equal pay and protection against the physical moral hazards (articles 1, 4 and 7 RSC respectively).[55]

The Framework Convention for the Protection of National Minorities (1995), which is a key instrument for the promotion of minority rights, was also ratified by the Republic of Cyprus.[56] This Convention is related to this research project because it prohibits any discriminatory practice against members of national minorities (article 4) and enshrines the right of individuals that belong in a national minority, to participate in 'economic life' (article 15).[57] Nevertheless, the Constitution of Cyprus does not use the term 'national minority'. Instead, it introduced two communities (Greek-Cypriot and Turkish-Cypriot) and three religious groups (Armenians, Latins and Maronites), whose members belong to one of the two communities.[58] However, this terminological gap could possibly cause problems for the members of the three religious groups, even if they 'quite regularly [are] considered as minorities'.[59]

6.2.2 Concepts of 'employee' and 'salaried worker'

This sub-section explores the meaning of 'employee' and 'salaried worker' in the Cypriot legal system. Cypriot labour law is based on the relationship between employer and employee. The

[52] CoE, 'Cyprus and the European Social Charter' (March 2019) <https://rm.coe.int/pdf/1680492884> accessed 12 July 2019.
[53] Law 9(III)/96, which ratified the Additional Protocol to the ESC of 1997.
[54] Additional Protocol to the European Social Charter providing for a System of Collective Complaints (9 November 1995) ETS 158, article 2.
[55] *University Women of Europe v. Cyprus* (Complaint N.127/2016).
[56] Framework Convention for the Protection of National Minorities (1 February 1995) ETS 157.
[57] Ibid, articles 4 and 5.
[58] Constitution of Cyprus, article 2.
[59] Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Cyprus adopted on 18 March 2015, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680483b48> accessed 11 July 2019, p.7.

term ‘employee’ (in Greek: ‘εργοδοτούμενος’) is defined in Law 24/67 as ‘the person that works for another physical or legal person (of public or private nature), either under a contract of employment or apprenticeship,[60] or under such conditions from which an employment relationship may be inferred’.[61] Law 104(I)/2000 (transposing Transfer of Undertakings EU Directive 2001/23) and Law 25(I)/2001 (transposing Insolvency EU Directive 2008/94) adopted the same definition of ‘employee’ as in Law 24/67.[62] However, Law 25(I)/2001 does not include individuals that work for the Government of Cyprus.[63]

Law 205(I)/2002 (on grounds of disability) and Law 58(I)/2004 (for grounds of religion or belief, age, sexual orientation, racial or ethnic origin), which transposed EU Equality Directives (2000/78 and 2000/43), adopted a broader definition of ‘employee’ – i.e. ‘any person who works or is trained in full-time or part-time occupation, fixed-term or permanent employment, continuous or otherwise, irrespective of the place of employment, including home employees but excluding self-employment’.[64] It is interesting that the term ‘employee’ as defined in Law 133(I)/2002 (transposing 2006/54) for Equal Treatment in Employment and Occupation takes the meaning of ‘salaried worker’ (in Greek: μισθωτός), which is defined in Social Insurance Law 59(I)/2010.[65] ‘Salaried worker’ is broadly defined as ‘the person that is employed in an insurable employment’ and the concept of ‘employee’ appears as a constituent category of ‘salaried worker’.[66] The different types of ‘insurable employment’ are set out in the Annex I of Law 59(I)/2010.[67] As Nicos Trimikliniotis and Corina Demetriou observed, the term ‘salaried worker’ ‘follows the modern approach taken in Greece, i.e. someone who is paid a wage/salary (μισθός) rather than the translation of the English εργοδοτούμενος, who is someone who is literally given work by the employer’.[68]

[60] The basic contract principles, as set in Contract Law C149, which include
[61] Law 24/1967, article 2; This definition also covers employee shareholders in a company (as defined in Company Law (Cap.113), who do not work under an employment contract but under such conditions from which an employment relationship may be inferred.
[62] Law 104(I)/2000, article 2; Law 25(I)/2001, article 2.
[63] Law 25(I)/2001, article 2.
[64] Law 127(I)/2000, article 2; translation from Trimiklionitis N. and Demetriou C. ‘The Concept of ‘Employee’: The Position in Cyprus’ in Waas B. and van Voss G.H. (eds) *Restatement of Labour Law in Europe* (Hart Publishing 2017), p.92.
[65] Law N.59(I)/2010, article 2.
[66] Law N.59(I)/2010, article 2.
[67] These types of insurable employment are set out in, which include: employees, clerks, employment of an imprisoned person, employment of a shareholder in a company, diplomats, vocational education and training schemes, a captain or crew member.
[68] Trimikliniotis and Demetriou (n.64), p.91.

The term 'employee' under Law 24/67 also covers individuals that work for public law bodies with legal personality or for public law organizations without legal entity.[69] However, Law 1/90,[70] whose matters fall in the sphere of public law, provides a special regulation for recruitment, promotion, dismissals and posting of public employees.[71] This means there is a key distinction between public (or semi-public permanent)[72] employees and private employees.[73] The labour protection for public employees falls in the scope of administrative law, which means: a) their employment rights are governed by administrative acts, using principles from civil law traditions; and b) the arising disputes are resolved by the Administrative Court of Cyprus (before 2015, the disputes at first instance were decided by the Constitutional Administrative Court (CAC)).[74] Whereas, private employees' protection falls in the scope of private labour law, which means that: a) their employment rights are governed by private law and common-law principles; and b) the arising disputes are resolved by the Industrial Disputes Tribunal (IDT) and the Supreme Court of Cyprus (SCC).[75] Nevertheless, there are specific matters (such as protection of the right to strike that is guaranteed in article 27 of the Constitution of Cyprus), which even if they involve public or private employees, are always governed by public law because they entail State responsibility.[76]

The domestic courts developed some tests to determine on a case-by-case basis the nature of employment relationship, which is not defined in domestic law (e.g. Law 24/67). By applying these tests, the domestic courts seek to distinguish an employee that is working under a contract of employment, from an individual that works under a contract for service (as independent contractors). These tests include two mandatory criteria, which shall always be met for the existence of employment relationship,[77] and other auxiliary conditions (such as payment of salary by the employer to the employee).[78] The two mandatory criteria consist of: a) the control test;[79] and b) determining whether the employee agrees to perform a service for employer's

[69] Law 24/1967, article 2.
[70] Law 1/90 covers permanent, non-permanent and fixed-term employment (article 2 of Law 1/90).
[71] The regulation of 1/90 does not cover individuals that work 'in the army or the security forces of the Republic' (article 122 of Constitution of Cyprus). See article 122 of the 1960 Constitution of Cyprus about the specific bodies that are included in or excluded from the term 'public service'.
[72] *Avraam v. The Republic* [2008] 3 CLR.
[73] The distinction between public and private sphere is not always clear-cut. See *Stelios Aristotelous v. Dimou Kato Polemidion, Yiorgos Araouzos v. Dimou Kato Polemidion* (2008) 3 C.L.R. 124.
[74] Law 73(I)/2018.
[75] For Appeals.
[76] Emilianides and Ioannou (n.18), p.31.
[77] *Tsapaco Catering Ltd v. Republic of Cyprus* (1998) 3 C.L.R. 796.
[78] *Theodoulou v. Aspis Pronoia Asfal. Et. Zois* (1997) 1 C.L.R. 1551.
[79] See more about the control test in Emilianides and Ioannou (n.18), pp.32-34.

company (in Greek: 'να παρέχει τις υπηρεσίες του').[80] It appears that the domestic courts followed the criteria/tests that were developed in the landmark English case of *Market Investigations Ltd. v. Minister of Social Security*, to distinguish a 'contract of services' from a 'contract for services'.[81]

Nevertheless, independent contractors (who work under contract for service) could fall in Social Insurance Law 59(I)/2010 as part of the category of 'self-employed workers' (in Greek: 'αυτοτελώς εργαζόμενος'), which is a distinct category from 'salaried workers'.[82] As prescribed in Law 59(I)/2010, the term 'self-employed worker' is defined as 'the person that works to make profit, who is also excluded from the categories of insurable employment in the Annex I of Law 59(I)/2010'.[83] It is interesting that self-employed workers (as independent contractors), who are set in the foundations of Social Insurance Law 59(I)/2010, are not covered by all equality Cypriot laws that promote equal treatment in employment and occupation. For example, they are covered under Equal Treatment between Men and Women Law 133(I)/2002, but, they are explicitly excluded from the rest of equality laws (Laws 205(I)/2002, Law 58(I)/2004), which cover other discriminatory grounds (e.g. disability, racial or ethnic origin, religion and age).

6.2.3 Cypriot Economic Adjustment Programme (EAP) and Post-Programme Surveillance (PPS)

This section sets the framework of the so-called 'Cypriot economic crisis', which was mainly treated from scholars as a financial, or banking crisis.[84] This section deploys the argument that the Economic Adjustment Programme (EAP) and Post-Programme Surveillance(PPS), which were agreed between the Republic of Cyprus and the ECB/EC/IMF ('Troika' or 'Institutions'),[85] are focused on competitiveness rather than on employment security and social security protection. As the rates of unemployment and poverty reached record numbers during

[80] *Theodoulou v. Aspis Pronia Life Insurance Company* (1997) 1 C.L.R. 1551.
[81] *Market Investigations Ltd. v. Minister of Social Security* [1968] 3 All E.R.
[82] Law 59(I)/2010, article 2.
[83] Ibid, Table II, Part II.
[84] Zenios S., 'The Cyprus Debt: Perfect Crisis and A Way Forward' (2013) 7(1) *Cyprus Economic Policy Review* 3 <https://www.ucy.ac.cy/erc/documents/Zenios_3-45.pdf> accessed 7 July 2019; Hardouvelis G. and Gkionis I., 'A Decade Long Economic Crisis: Cyprus versus Greece' (2016) 10(2*) Cyprus Economic Policy Review* 3, p.16; Clerides S., 'The Collapse of the Cypriot Banking System: A Bird's Eye View' (2014) (8)2 *Cyprus Economic Policy Review* 3, pp.3-35.
[85] European Commission, 'The Economic Adjustment Programme for Cyprus' (Occasional Papers 149, March 2013) <http://ec. europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp149_en.pdf> accessed 13 July 2019 (EAP Cyprus).

the period of Cypriot crisis,[86] it seems that the crisis had spill-over effects on labour and social security systems. The analysis in this section is divided into two sub-sections: the Economic Adjustment Programme (2013-2016) and the Post-Programme Surveillance(2016-onwards).

6.2.3.1 Cypriot Economic Adjustment Programme (2013-2016)

In April 2013, the 'Troika' agreed an Economic Adjustment Programme (EAP)[87] with the Government of Cyprus that was based on three pillars: firstly, to restructure the banking sector, secondly, to build a comprehensive fiscal consolidation plan, and thirdly, 'to support competitiveness and sustainable balance'.[88] The Cypriot crisis resulted from a series of events, such as: the blockage of Cyprus from access to international capital markets for two years (September 2011-September 2013);[89] and the destruction of the island's largest electricity producing plant ('Vasilikos') by a lethal explosion on 11 July 2011, whose restoration was estimated to cost between approximately 2.4 and 3 billion euros.[90]

Since the Republic of Cyprus joined the Exchange Rate Mechanism II (ERM II) and replaced its national currency ('Cypriot Pounds') with Euro currency, the Republic of Cyprus was eligible to request financial assistance under the European Stability Mechanism (ESM).[91] In June 2012, the Government of Cyprus submitted an official request to the President of Eurogroup asking for financial assistance from the ESM/European Stability Facility (ESF).[92] On 16 March 2013, the Eurogroup reached a political agreement, according to which the Government of Cyprus was committed to 'introduce an upfront one-off stability levy applicable to resident and non-resident depositors, both insured and uninsured' (also known as the 'haircut').[93]

The EAP is composed of four main documents, endorsing the IMF model: the Letter of Intent, the Memorandum of Understanding on Specific Economic Policy Conditionality, the

[86] See statistics about unemployment and poverty in Cyprus in nos.9 and 10.
[87] EAP Cyprus (n.85).
[88] Ibid, p.134.
[89] EAP Cyprus (n.85), p.39.
[90] EAP, 2013 (n.85); Kruse T., 'Cyprus: The Troika's new approach to resolving a financial crisis in a Eurozone member state' in Magone J.M., Laffan B. and Schweiger C. (eds) *Core-Periphery Relations in the European Union* (Routledge 2016), p.194.
[91] ERM, 'Communique' between ERM II and the Government of Cyprus (Brussels, 29 April 2005) <http://ec.europa.eu/economy_finance/publications/publication6159_en.pdf> accessed 27 July 2019; European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (Decision 2011/199), article 1.
[92] ESM official website, < https://www.esm.europa.eu/assistance/cyprus> accessed 23 October 2018.
[93] EAP Cyprus (n.85), p.7.

Memorandum of Economic and Financial Policies (MEFP) and the Technical Memorandum of Understanding (TMU). The Letter of Intent, which takes the form of unilateral expression of interest, was signed by the Minister of Finance of the Republic of Cyprus and the Governor of the Central Bank of Cyprus.[94]

The Cypriot EAP, as a form of ESM financial assistance, was made subject to 'strict conditionality'.[95] As part of the 2013 EAP, Cyprus authorities committed to implement a series of policies and increase the efficiency of Cypriot economy. The term 'strict conditionality' entails strict supervision of economic measures by the 'Troika', which means that the Government should set as its priority the economic policies (as part of the MoU) over other policies. Even if the EAP was launched after an agreement between Cyprus and the Troika, Cyprus appeared weak towards negotiating labour standards as part of the package. Singh noted that the stage of negotiations between 'Troika' and the Cypriot Governmental authorities could leave room for reaching an agreement that represents the interests of both sides.[96] It seems that policies to tackle unemployment were used as methods to increase competitiveness of labour market, which could enable Cyprus to make a come-back to the international markets and enhance credibility of creditors. In *Pringle* (C-370/12), the CJEU also emphasized the important role of strict conditionality in monitoring lending mechanisms.[97] Even if the Commission Proposal 2013(233), which was further endorsed by the Council Decision 2013/236, did mention that the Government of Cyprus shall take measures to minimize the impact of 'underperformance of revenues or higher social spending needs' on disadvantaged people, this provision cannot be translated as labour and social security protection.[98]

The MoU also introduced a privatization plan for State-Owned Enterprises (SOEs), such as the Electricity Authority of Cyprus (EAC).[99] This plan, which has not yet been enforced, would have an impact on the labour protection of employees because they would change from semi-public, which fall in the category of public servants, to private employees. This means they would be protected under labour law protections, rather than administrative law (for the distinction between labour law and administrative law, see section 6.2.2).[100] The trade unions

[94] Ibid.
[95] TFEU, article 163(3).
[96] Ibid.
[97] Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General* [2012] OJ C26/15, paras.136-137 and 142.
[98] Council Decision 2013/236/EU of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth [2013] OJ L 141/32 (not in force).
[99] EAP Cyprus (n.85), p.144, para.33.
[100] Ibid.

(FPUEAE, SIDIDEK, SEPAIK) opposed this plan, which according to Troika aims to increase competitiveness.[101] The trade unions asked Members of the Parliament of Cyprus to discuss the issue in the Economic Commission) (ΕΠΟΙΚ) as such a plan could lead employees exposed to job insecurity.[102] The reasons that are laid behind the opposition of trade unions includes the fear that the employees will be exposed to the risk of risk of unemployment during the transitional period of privatization.

The key question that arises is to what extent labour and social security standards were included in the scope of the EAP. The Memorandum of Understanding on Specific Economic Policy Conditionality ('MoU'), which was prepared by Troika, set out a series of fiscal-structural measures (also known as 'austerity measures') that had to be implemented at the domestic level by the Government of Cyprus.[103] The disbursement of loan money was made in tranches and each tranche was conditional upon progress which was made by the Government of Cyprus in regard to the application of the MoU. These austerity measures included, among others, cuts to social benefits and measures to activate employment.[104] The MoU of 2013 noted that the Republic of Cyprus has 'implemented permanent wage cuts applying to the broad public sector' and 'abolished and/or reduced a number overlapping benefits' in order to achieve fiscal consolidation.[105] The Governmental Authorities of Cyprus were also bound to take measures to increase the competitiveness level of the tourism industry, which is one of largest industries in Cyprus.[106]

In the IMF/EC Monitoring Reports, the discussion shifted from labour protection to productivity and competitiveness. According to article 2(10) of the EU Council Decision 2013/236, the Republic of Cyprus shall improve labour productivity and give incentives 'to take up work'.[107] During the period 2013-2016, the Republic of Cyprus was also excluded from Country-Specific Recommendations (CSR) to avoid duplication of standards.[108] This could be translated as setting competitiveness as a priority over other aims.

[101] EAC official website, <https://www.eac.com.cy/EL/EAC/DocLib/110.pdf> accessed 13 July 2019, pp.15-18.
[102] Ibid.
[103] EAP Cyprus (n.85).
[104] IMF, 'Cyprus: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding' (29 April 2013) <https://www.imf.org/external/np/loi/2013/cyp/042913.pdf> accessed 27 July 2018, p.12, para.27.
[105] Ibid, p.11, para.22.
[106] Ibid.
[107] Council Decision 2013/236, article 2(10).
[108] CSR official website, 'The country-specific recommendations (CSRs) in the social field: An overview and (initial) comparison of the CSRs 2011-2012, 2012-2013 and 2013-2014: Stefan Clauwaert Background note,

6.2.3.2 Post-Programme Surveillance (2016-onwards)

In March 2016, the Republic of Cyprus cancelled the Extended Fund Facility (EFF) arrangement and successfully exited the EU/IMF bail-out programme on the basis of reduction of the public deficit.[109] However, since Cyprus has not managed to repay a minimum of 75% of the financial assistance received (ESM/IMF loans), it remains under Post-Programme Surveillance undertaken by the EC and the ECB (Post-Programme Surveillance, PPS), the IMF (Post-Programme Monitoring, PPM) and the ESM (Early Warning System, EWS).[110] The mandate of the Post-Programme Surveillance (PPS/PPM/ESM) is to ensure that Cyprus will be capable to repay its outstanding loans to the lenders (ESM/IMF). Under the PPS, the EC and the ECB assess the Cyprus' economic, fiscal and financial situation on a regular basis.[111]

The EC also prepares semi-annual reports and determines whether corrective measures are required to be adopted.[112] Under the PPM (IMF's Post-Programme Monitoring), the IMF undertakes consultations, basically on macroeconomic and structural policies, at least twice per year.[113] The EC Reports flag up the main developments and current challenges that Cyprus is facing each semester. For example, the 2018 EC Report stated that the Cypriot Parliament introduced the National Health Service (NHS) in the previous semester, which will be launched by 2020.[114] In addition, the EC sets out the rates, which are important for describing the level of competitiveness in Cyprus. For example, the 2018 Report stated that the rate of youth unemployment remains high as it reaches the rate of 40%.[115] It further noted that the problem of youth unemployment will be solved through ALMPs and the creation of the casino, which will create a lot of job positions.[116] The creation of casino as a method to tackle youth

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September 2013, < https://www.etuc.org/sites/default/files/document/file/2018-06/Comparison_CSRs_in_the_social_field_2.pdf> accessed 23 October 2018, p.12.

[109] European Commission, 'Eurogroup Statement on Cyprus' Statements and Remarks 105/16 (7 March 2016) <http://www.consilium.europa.eu/press/press-releases/2013/03/pdf/Eurogroup-Statement-on-Cyprus(1)/> accessed 25 July 2018.

[110] Regulation No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1, article 14; EU Briefing: Cyprus' financial assistance programme (March 2016) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/574401/IPOL_BRI(2016)574401_EN.pdf> accessed 27 July 2018.

[111] EU Regulation 472/2013, article 14(3).

[112] Ibid.

[113] IMF Factsheet 'Post-Program Monitoring' (March 2016) <https://www.imf.org/About/Factsheets/Sheets/2016/08/02/21/48/Post-Program-Monitoring?pdf=1> accessed 27 July 2018.

[114] European Commission, Post-surveillance Adjustment Programme in Cyprus (January 2018), < https://ec.europa.eu/info/sites/info/files/economy-finance/ip083_en.pdf> accessed 14 September 2018, p.31.

[115] Ibid, p.7.

[116] Ibid, pp.7-8.

unemployment does not seem a very convincing argument since it will create specific types of jobs, for which the young people might not have the acquired skills to get these job positions or the transferable skills afterwards to get others. The 2018 Report also refers to the evaluation process of the ALMPs, which has just begun, which is important in terms of assessment as to whether there has been facilitation of workers back to employment.[117] These EC Reports, which are brief and descriptive are not really a means of facilitating communication between Cyprus and EU. They aim to narrowly describe the current economic situation, using graphs and tables, rather than reflecting the concerns felt by those living in Cyprus and in the Cypriot labour market.

6.3 Social dialogue

The Constitution of Cyprus enshrines the freedom of association (article 21) as a non-absolute right. Article 21 of the Constitution integrates the restrictions from article 11 ECHR, however, it provides two additional restrictions. Firstly, the freedom of association shall be in conformity with the constitutional order.[118] Secondly, the national legislation can set restrictions for individuals who are employed in the Special Forces, police or coast guard.[119] The Republic of Cyprus ratified ILO Convention N.98 of 1949, which enshrines the right to organise and the right to collective bargaining.[120] The forms and content of social dialogue differs at national, sectoral and company level. Industrial relations in Cyprus, which endorsed the concept of tripartism, shows that social actors (government, employers' and trade unions) are determined to resolve their disputes in an amicable manner.

The largest trade unions in Cyprus, which were registered through the procedures of Trade Union Law 71/1965, are the following: PEO, SEK, DEOK, POAS and POVEK (the largest trade union for self-employed workers).[121] There is a long tradition of close relationships between trade unions and political parties, which might explain why the Parliament of Cyprus shows considerable willingness to inform and consult trade unions at national level.[122] Since

[117] Ibid.
[118] Constitution of Cyprus, article 21(4).
[119] Ibid, article 21(5).
[120] Law 18/1966.
[121] Trade Unions Law 71/1965.
[122] Katsourides, Y. 'Political parties and Trade unions in Cyprus' (Hellenic Observatory Papers on Greece and Southeast Europe, LSE, 2013) <http://eprints.lse.ac.uk/52625/1/GreeSE%20No74.pdf> accessed 13 July 2019, p.2.

Cyprus implemented Directive 2009/38, trade unions are also eligible to participate in European and domestic Works Councils.[123] These regional and domestic social dialogue procedures can play a key role in facilitating the communication between systems at different levels. An example is the 2016 Second-stage consultation of the social partners at European level under article 154 TFEU, in which the social actors from Cyprus informed the European social partners that Cyprus did not provide protection of paternal leave. A year after taking advice through the EU consultations, Cyprus introduced the legal framework on paternal leave (Law 116(I)/2017).[124] In other words, social actors could be described as 'transmitters of information' between systems. In the era of economic crisis, social actors did not participate in the process of drafting and concluding MoUs, however, their role was recognized at the implementation process.[125] For example, 'Troika' (IMF/EC/ECB) agreed to consult with social partners before adopting reforms on wage indexation and social welfare.[126] Employers' associations consist of the Cyprus Employers' and Industrialists Federation (OEB) and the Cyprus Chamber of Commerce and Industry (CCCI).[127] In March 2017, the OEB participated in the European Social Dialogue Committee, in which they discussed the reform of Social Security Regulation 883/2004.[128]

The Ministry of Labour and Social Insurance has permanent tripartite social dialogue bodies, which deal with specific subjects.[129] Examples of these bodies are: i) the Committee of Equality between men and women in occupation and vocational training, which acts as an advisory body in compliance with Directive 2006/54; and ii) the Committee of the Fund for the Protection of Employees' Rights in the Event of Insolvency of the Employer. Before the Committees, the individuals can lodge complaints that are further examined by the Inspectors of the Ministry of Labour and Social Insurance Officers. The reports that are prepared by the Inspectors seem to play a key role in the judicial procedure.[130]

The Labour Advisory Board (LAB) is eligible to appoint a tripartite technical committee, which consists of representatives from government, trade unions and employers' organizations,

[123] Law 106(I)/2011.
[124] EU, Commission Staff working Document, Second-stage consultation of the social partners at European level under Article 154 TFEU on possible action addressing the challenges of work-life balance faced by working parents and caregivers (Brussels, 12.7.2016) SWD (2016) 145 final.
[125] Council Decision 2013/233, article 2(10).
[126] Ibid.
[127] OEB official website, <http://www.oeb.org.cy/en/oeb-participates-in-the-european-social-dialogue-committee/> accessed 13 July 2019; KEBE official website, <http://www.ccci.org.cy/> accessed 27 July 2018.
[128] Ibid.
[129] Law 24/1960, article 2; ILO Convention N.150 of 1978, article 5.
[130] *Kaja Giecewicz v. The Moorings Snack Bar and Restaurant Co. Ltd.* (3/3/2017) App. N. 662/11.

before the adoption of a legislative proposal.[131] It seems that the role of social partners in the LAB is not to be underestimated since LAB members are invited to participate in the discussions during preparation of legislative proposals.[132]

The Industrial Relations Code (IRC) of 1977, which replaced the 'Basic Agreement' of 1962, regulates social dialogue at sectoral and company-level.[133] The IRC constitutes a soft-law instrument (Gentlemen's Agreement) and sets out the procedures for the settlement of disputes about interests, which consist of direct negotiations, mediation, arbitration and personal complaints.[134] Despite the important role of IRC in regulating social dialogue procedures at enterprise and sectoral level, there are still two normative gaps in the IRC. Firstly, it fails to describe how to distinguish social dialogue into three categories based on their content: 'bargainable', 'consultative' and 'prerogatives of management'.[135] This terminological gap could cause normative problems because the employer is eligible to act unilaterally without consulting trade unions or employees for issues that fall in the category of 'prerogatives of management'.[136] Whereas, the employer is responsible to negotiate with employees' representatives for 'bargainable' or 'consultative' matters.[137] Even for 'consultative' matters, such as lay-offs and inter-changeability, the employer has the final say.[138] Secondly, a violation of the IRC does not involve any legal sanctions.[139] However, the obligation of employers to accept and recognize trade unions is enshrined in Law 55(I)/2012, which shows that despite the legal nature of IRC as soft-law, the right to organize and the right to collective bargaining are conceived as basic principles of the Cypriot labour system.[140]

Article 26(2) of the Constitution of Cyprus provides that a law may provide for collective labour contracts of obligatory fulfilment by employers and workers with adequate protection of the rights of any person, whether or not represented at the conclusion of such contract.[141] It seems that there is still a legislative gap because the Republic of Cyprus has not yet adopted

[131] Official website of government of Cyprus, <http://www.mlsi.gov.cy/mlsi/mlsi.nsf/All/42E8596C8CCC6CA4C22577F9003739CB?OpenDocument> accessed 13 July 2019.
[132] Ibid.
[133] Industrial Relations Code of 1977 (IRC).
[134] Ibid.
[135] IRC, Part I, section C(I).
[136] Ibid, Part I, section C(2).
[137] Ibid.
[138] Ibid; Dew P. (ed), *Doing Business with the Republic of Cyprus* (GMB Printing 2004), p. 221.
[139] Emilianides and Ioannou (n.18), p.55.
[140] Law 55(I)/2012.
[141] Constitution of Cyprus, article 26(2).

the appropriate legal framework as prescribed by article 26(2) of the Constitution to recognize the legal effect of collective agreements. Emilianides and Ioannou articulated the view that, instead, the success of collective agreements rests on the strong willingness of social partners and the good faith of employers and trade unions.[142] However, it does not seem very convincing to describe the reliance on collective agreements as successful. Since the legal nature of collective agreements was not endorsed in an appropriate legal framework, as prescribed in article 26(2) of the Constitution, there is a notable deficit. A collective agreement, which was not endorsed in domestic legislation, does not directly create legal rights and obligations for public employees, if it not implemented by the administrative bodies.[143] In *Stylson Engineering*, the SCC discussing the hierarchy of collective agreements and other instruments, stated as *obiter dictum* that the norms of the employment contract are prioritized over those of collective agreements.[144]

However, even if collective agreements give flexibility to interested actors to regulate matters and represent their interests, it appears that the texts of agreements are brief and general, without setting out the detailed norms. For example, the 2012 Collective Agreement between PEO and SEPS just states that dismissal procedures for workers shall be in line with Termination of Employment Law 24/1967.[145] The 2012 Collective Agreement reflects the provisions of IRC to regulate the procedures for termination of employment. The IRC states that collective agreements shall also introduce provisions to regulate dismissals.[146] In this context, the IRC introduces a provision on dismissal law, according to which employers shall inform social partners about the dismissal two months prior to termination of employment.[147]

Christophorou et al. have observed that tripartite collective agreements have decreased flexibility of the Cypriot labour market.[148] However, it cannot be underestimated that collective agreements are a useful means for resolving disputes and introducing labour and social security standards, which could reflect the interests of all parties. For example, a tripartite collective agreement was concluded in 2017 to reactivate the cost of living allowance

[142] Emilianides and Ioannou (n.18), p.55.
[143] *DerParthogh v. CYBC* [1984] 3 CLR 635.
[144] *Antonis Loizou v. Stylson Engineering Co. Ltd* (1998) 1 C.L.R. 2077.
[145] Collective Agreement between PEO and SEPS (20 April 2012) 2012/8/1.0.202.
[146] IRC, part II(C).
[147] Ibid.
[148] Christophorou C., Axt H. and Karadag R., 'Cyprus Report: Sustainable Governance Indicators 2017' <http://www.sgi-network.org/docs/2017/country/SGI2017_Cyprus.pdf> accessed 28 July 2019, pp.7-8.

(COLA), which was suspended during the EAP.[149] The COLA is 'a wage indexing system' for public and private sector, which is regulated by collective agreements rather than a legal instrument, was primarily introduced by the British Colonial Government in 1940s.[150] The COLA for public employees was suspended by Law 192(I)/2011 to reduce the costs, whereas the COLA for private employees was suspended in 2013.[151] In 2017, social actors concluded a COLA agreement for public employees and another one for private employees to set the main standards for the period between 2018 and 2020 (i.e. setting out how COLA is calculated). This period was characterized between the social partners as a transitional period, since they aim to introduce a permanent wage index by the end of 2020.[152] The reactivation of COLA in 2018 was embraced by all parties, since the employees receive an additional amount on their normal pay, because of the high cost of living.[153]

6.4 Regulation of employment security

This section examines the regulation of employment security. The first sub-section discusses the Termination of Employment Law 24/67, which regulates individual dismissals, and provides three examples to show how the Cypriot Courts fiercely promote job security. Whereas, collective dismissals are regulated by Collective Redundancies Law 28(I)/2001, which implemented EU Directive 98/59. The second sub-section examines the domestic (Cypriot) laws, which transposed EU Directives 92/85, 2000/43, 2000/78, 2006/54 and 2010/18. In this context, it seeks to examine to what extent the Cypriot legal system adopted a more inclusive approach over employment security, making a comparison with the other transnational labour regulatory systems.

6.4.1 Termination of employment law 24/67

The Termination of employment Law 24/67 is the first Cypriot hard-law instrument, which provides protection to workers against unfair or unlawful dismissals. Law 24/67 endorsed the normative legal framework of ILO Convention N.158, which was ratified by the Republic of

[149] Eurofound, <https://www.eurofound.europa.eu/publications/article/2017/cyprus-social-partners-agree-to-reactivate-cost-of-living-allowance> accessed 13 July 2019.
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Republic of Cyprus, Ministry of Finance <http://www.oeb.org.cy/wp-content/uploads/2018/01/2018.pdf> accessed 13 July 2019.

Cyprus.[154] For example, articles 5 and 6 of Law 24/67 set the same valid and non-valid grounds of dismissals as established ILO Convention N.158.[155] The legitimate reasons for redundancy, which refers to individual dismissals under Law 24/67, could constitute valid reason of dismissal. Law 25(I)/2001 (transposing EU Directive in the event of insolvency 2008/94)[156] and Law 104(I)/2000 on Transfer of Undertakings (implementing EU Directive 2001/23)[157] provide employment security protections in this spectrum, as illustrated in the analysis of section 5.3 on the EU Directives.[158]

The primary aim of Law 24/67, as interpreted by the SCC Judge Pikis, 'is the protection of employees from unilateral termination of employment as a social security measure'.[159] This statement implies that job security protection is conceived as part of the broader social security context. In addition, Judge Liatsos characterized Law 24/67 as a law of social content (in Greek: 'νόμος κοινωνικού περιεχομένου') that guarantees labour rights.[160] This section, which is focused on Law 24/67, sets three examples to argue that the national courts have shown great sympathy to the interests of employees to remain in a specific job. In this context, employment security as opposed to job security is almost non-existent.

Example I: Conduct of employee

The loss of trust and confidence in an employment relationship could constitute a just cause for termination of employment, according to article 6 of Law 24/67 .[161] The Industrial Dispute Tribunal (IDT) and the Supreme Court of Cyprus (SCC), which integrated the reasonableness test, adopted a strict stance over protection against dismissals for reasons related to an employee's conduct. The SCC has repeatedly and clearly stated that a decision for dismissal or instant dismissal (in Greek: 'άμεση απόλυση') shall be a measure of last recourse.[162] The IDT, which stated that the employee's conduct shall not cause any negative impact on the legitimate interests of the employer,[163] followed the SCC's logic in its judgments. For example, in *Stephanou Pitsillidi*, the IDT held that, even if it has been proven that the cash shortage was

[154] Ratification Law 45/85, article 11.
[155] Law 24/67, article 6.
[156] See more details about this Directive in chapter 5.3.3.
[157] See more about this Directive in chapter 5.3.2.
[158] *Loris Savvides v. 1. SSP Catering Ltd. 2. Redundancy Fund 3. CTC-ARI Airports Ltd.* (2012) 1 C.L.R. 2096.
[159] *Stelios Stylianides v. British American Co. Ltd.* (1990) 1 C.L.R. 157.
[160] *L. Papaphilippou & Co. v. Demetris Louca* (2014) App. N.59/2010.
[161] *Stephanou Pitsillidi v. National Bank of Greece (Cyprus) Ltd.* (29/5/2009) App. N. 1042/05.
[162] *Ekdotikos Oikos Dias Ltd. v. Giorgou Kogia* (2006) 1B C.L.R. 1227.
[163] *Stephanou Pitsillidi v. National Bank of Greece (Cyprus) Ltd.* (29/5/2009) App. N. 1042/05. The term legitimate interests refer to prestige, reputation or services of the employer.

caused by the employee's misconduct, the employer should have taken alternative measures (i.e. charge the employee and deduct the amount from employee's pay), before taking the final decision to dismiss the applicant.[164]

The Decree for recruitment in case of 'manifestly illegal or unfair dismissal' (in Greek: 'έκδηλα παράνομη ή άδικη απόλυση'), could also be conceived as a job security measure, because it helps the applicant to return to the same job.[165] Nevertheless, the ambiguous nature of the term, showed that the Courts very rarely order such Decrees.[166] The notice of dismissal in this context, which shall be given within one month from the incident, [167] could act as a safety net for employees against unfair or unlawful dismissal. The IDT held that a formal warning from the employer to the employee that his/her dismissal is a likely outcome, could create incentives for the employee to improve his conduct/performance. Such warning could then, help the employee to take his/her actions and convince the employer not to take the decision for his/her dismissal.[168] As illustrated in *Pitsa Tseriotou*, collective agreements can set higher standards for notice period.[169] For example, the 2012 collective agreement, which was concluded between the Cyprus Hotel Association (CHA) and the trade unions of SEK and PEO, provides that the employer must double the period of notice between specific periods (1 July and 30 September or 1 October and end of February).[170] This is an example of strict job security protection, which could act as an impediment for swift transitions in the labour market.

Example II: Redundancy

The organizational changes of the company cannot always act as a valid reason for redundancy (article 5 Law 24/67), according to the Cypriot Courts that fiercely promote job security.[171] There are specific circumstances under which the employer is eligible to make an employee redundant, which means that the employee will be entitled to receive compensation from the Redundancy Fund.[172] For example, in the case of *Chrystallas Christodoulou*, the applicant, who was employed as a hotel chambermaid, was dismissed due to operational changes in the

[164] *Panayiotis Panayiotou v. The Regis Milk Industries Ltd.* (12/3/2013) App. N. 211/09.
[165] Law 24/67, article 3.
[166] *Ilias Patsalides v. Cyprus Airways* (2012) 1 C.L.R. 194.
[167] *Kyprianou and sia v. Constantinou Petride (2007)* 1 C.L.R. 607.
[168] *Toulla Odysseos v. Spyros & Nicos Hatzipanayiotou Ltd.* (12/4/2013) App. N. 451/10.
[169] *Pitsa Tseriotou v. KANIKA HOTELS PUBLIC CO. LTD.* (18/5/2009) App. N. 478/07.
[170] Ibid.
[171] *Andrea Christophi Kyriacou v. Vassos Eliades Limited* (27/1/2011) App. N. 189/09; Law N.24/67, article 18(c).
[172] Law 24/67, articles 5(d), 16-22.

company.[173] However, after the applicant's dismissal, the employer recruited a seasonal worker to perform the working tasks that were previously undertaken by the applicant.[174] The IDT held that the recruitment of the seasonal worker to replace the applicant's position shows that the workload of the company was not reduced, which means that the dismissal of the applicant was not caused by the organizational changes of the company.[175] The IDT, which applied the reasonableness test,[176] based its reasoning on the SCC's ruling according to which 'the modernization, or reorganization or any other change of the enterprise' constitutes a valid reason for redundancy only if it leads to the reduction in the number of required employees as described in article 18(c) of Law 24/67.[177]

Example III: return from sick leave

Law 24/67, which endorsed the norms from ILO Convention N.158 (article 6), provides that dismissals are not lawful for reasons related to sick leave. According to the IDT, when the employer fails to warn the employee, that his or her absence from work in sick leave, could cause his or her dismissal, the dismissal is unlawful because the employer did not give the opportunity to the employee to defend herself and explain the reasons of his or her absence.[178] This shows that Cypriot Courts conceive dismissal as a measure of last recourse and ask for employers to take other actions before taking the decision for dismissing an employee. For example, in the case of *Antonis Staphylides*, the applicant was dismissed after his return from sick leave.[179] His employer alleged that reason for dismissal was because the employee was absent from work for multiple periods.[180] The IDT held that the employer shall get more information about the medical situation of his employee, but also to discuss the issue with him or his doctor before taking his final decision to dismiss him.[181]

6.4.2 Non-discrimination, job security and employment security

This section examines the domestic laws that promote equality in the context of employment security. This analysis illustrates (as in the context of Law 24/67) the Cypriot Courts' positive

[173] *Chrystallas Christodoulou v. 1. P. KISSONERGHIS HOTELS LTD. 2. Redundancy Fund* (4/2/2011) App. N. 131/08.
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] *Adelfoi Galatarioti Ltd. v. Paraskevis Grigora and others* (2001) 1 C.L.R.1985.
[178] *Eleftherias Antoniadou v. The German Baker Limited* (24/9/2009) App. N. 95/09.
[179] *Antoni Staphylide v. Nemesis Construction Public Company Ltd.* (5/5/2015) App. N. 101/2011.
[180] Ibid.
[181] Ibid.

approach over job security protections. The analysis is focused on: a) Maternity law 100(I)/1997 (transposing EU Directive 92/85), Equal Treatment between Men and Women Law 133(I)/2002 (transposing 2006/54) and Paternal Leave Law 116(I)/2017; and b) Parental Leave Law 47(I)/2012 (transposing Directive 2010/18). There are also other Equality Laws 58(I)/2004 (on grounds of religion or belief, age, sexual orientation, racial or ethnic origin) and 205(I)/2002 (on disability grounds), which implemented Directives 2000/78 and 2000/43, that deal with equality, job security and employment security (see further on the analysis of Equality Directives in section 5.2). Before looking at hard-law, it is important to note that matters regarding employment security and equality could also be examined through soft-law procedures by the Commissioner for Administration and Protection of Human Rights (Ombudsman), which could take various forms such as, positions, interventions, reports and consultation papers.[182]

6.4.2.1 Maternity Law 100(I)/1997, Equal Treatment between Men and Women Law 133(I)/2002 and Paternity Protection Law 117(I)/2017

Law 100(I)/1997, which implemented EU Council Directive 92/85, prohibits dismissals of biological mothers, mothers of adopted children and surrogate mothers (article 4(1)(a) of Law 100(I)/1997).[183] The period of prohibition for dismissal of biological mother lasts from pregnancy up to five months from the date that maternity leave ends, whereas the period for mothers with an adopted child lasts from the date of adoption up to three months after the date that maternity leave ends.[184] In the situation of mother, who has a child through surrogate arrangements, the period starts two weeks before the surrogate mother gives birth and ends fourteen weeks after the birth.[185]

The prohibition for dismissal of surrogate mothers, which was recently introduced by Law 116(I)/2017, sets a broader scope of protection from EU Directive 92/85, which solely focuses on mothers of biological and adopted children. The female workers, who are covered by the Law 100(I)/1997, are also eligible to request flexible working arrangements for a nine-month

[182] Ombudsman, < http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/index_en/index_en?opendocument> accessed 13 July 2019; The Ombudsman includes the National Human Rights Institution, the Equality Body, the Independent Mechanism for the Promotion of the Rights of Person with Disabilities (which was established under the UN CRPD) and the Office of the Commissioner for Administration.
[183] Law 100(I)/1997, article 4(1)(a) and 4(A).
[184] Ibid, article 4(1)(a).
[185] Ibid, articles 3A(2)(b), 3(2A).

period after the date of birth or the date of adoption.[186] These flexible working time arrangements consist of an hour daily break or the eligibility to arrive an hour later or leave from work an hour earlier.[187] Among the flexible arrangements, female workers, who are protected under Law 100(I)/1997, are eligible to ask for medical leave for pre-natal testing.[188]

The prohibition for dismissal also covers male workers, who would like to exercise their right to paternal leave as set out in Law 117(I)/2017. In this context, it is important to note that the Supreme Court of Cyprus (SCC) declared Paternity Law (Amending) of 2018 (Law 117(I)/2017), which was extending the scope of protection for paternity leave and allowance to unmarried fathers, as unconstitutional.[189] In the President of Republic v. House of Parliament case (2019), the SCC explained that: a) the EU law does not create binding obligations according to which the Member States shall include unmarried fathers in the scope of protection and b) it is profound that the Law increases the budgetary cost of the Republic of Cyprus. For this reason, it excluded unmarried fathers from the scope of protection. Nevertheless, the period for paternal leave lasts only for two weeks and can be exercised within a specific period, which begins from the date of confinement and ends up to 16 weeks after the date of confinement or adoption.[190] It is notable that a male worker, who is covered by Law 116(I)/2017, is not entitled to similar flexible working time arrangements as a female worker, who is covered by Law 100(I)/1997.

The approach of the IDT towards job security protection for pregnant workers and mothers in the times of economic crisis reflects the promotion of social justice as established in the regional and international human rights related instruments. In *Eleni Diamantidou*, the IDT examined whether the termination of employment was fair. In the present case, the plaintiff claimed that she was dismissed after she notified her employer that she was pregnant.[191] The defendant, who claimed that the reason of dismissal was not related to pregnancy and maternity reasons, took the decision to dismiss Mrs. Diamantidou because she was regularly 10-15 minutes late for work.[192] However, the IDT decided that the dismissal was unfair due to the following reasons: a) even if the employee was regularly late for work, she also stayed to complete the required working hours, b) the employer did not dismiss another employee, who

[186] Ibid.
[187] Ibid, article 5.
[188] Ibid, article 5A.
[189] *President of the Republic v. House of Parliament* (6 February 2019) App. Nos. 2/2018 and 3/2018.
[190] Law 116(I)/2017, article 3(1).
[191] *Eleni Diamantidou v. M and M Investments Ltd.* (16 February 2009) App. N. 312/05.
[192] Ibid.

was also regularly late for work and c) the new employee, who was recruited to replace Mrs. Diamantidou, was recruited to replace a pregnant worker.[193] The IDT finally held that the regular delay of the employee for work was used by the employer as an excuse to dismiss the plaintiff because she got pregnant.[194] The employer, on whom the burden of proof lay, failed to prove that the dismissal was not due to maternity and pregnancy reasons.[195] The IDT further held that the termination of employment for reasons related to sex (equality between men and women), which is prohibited by EU Directive 2006/54.[196]

According to article 4(1)(a) of Law 100(I)/1997, the female worker is protected under Law 100(I)/1997 only if the worker informs her employer in writing of her pregnancy.[197] The employer may also ask for a medical certificate, which confirms the predicted date of birth.[198] In the case where the employee is pregnant at the time of dismissal or notice for dismissal, the employer is obliged to cease its decision for dismissal if the employee gives to her employer a medical certificate to confirm her pregnancy within five days from the date of dismissal or notice for dismissal.[199] Nevertheless, the IDT as shown in the following cases adopted a more flexible approach over the technical criteria to ensure job security of workers, who are protected under Law 100(I)/1997. In *Margharita Mavrommati*, the plaintiff dismissed the applicant without notice four days after she orally informed her employer that she was pregnant.[200] The plaintiff alleged that the reason for dismissal was because the applicant was recruited for a probation period and 'failed to meet the plaintiff's expectations' (in Greek: 'δεν είχε ανταποκριθεί στις προσδοκίες τους').[201] The IDT did not accept the plaintiff's allegations and stated that any dismissal for reasons related to maternity or pregnancy are not in line with the social aim of EU and domestic labour law.[202]

The plaintiff's allegations do however illustrate the weak protection of Law 24/67 for newer workers.[203] To explain, Law 24/67 provides the right to compensation for employees, who completed a period of employment no less than 26 weeks of employment.[204] This means that

[193] Ibid.
[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] Law 100(I)/1997, article 4(1).
[198] Ibid, article 4(2).
[199] Ibid, article 4(3).
[200] *Margherita Mavromati v. Touchstone Technologies Ltd.* (30/12/2015) App. N. 663/2007.
[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] Law 24/67, article 3.

employers can dismiss an employee who has not completed the required period of 26 weeks and recruit another employee replacing the dismissed employee, leaving unprotected those individuals who seek to transition from unemployment to employment. However, employees, who are covered by Law 100(I)/97, are entitled to the right of compensation as described in Law 24/67 and Law 133(I)/2002 even if they have not completed 26 weeks of employment.[205]

Apart from protecting female employees against dismissal, Law 100(I)/1997 also stipulates that employees, who are protected under the Law, are also entitled to return to the same job position or another job position, which shall be equivalent (i.e. same level of income and similar nature of job), after maternity leave.[206] This provision, which promotes employment security as it facilitates the transition from one job position to another, is also enshrined in Paternity Leave Law 117(I)/2017.[207] In *Nina Magdalide*, the plaintiff (employer) called the applicant (employee) a few days before the end of her maternity leave to tell her that she was dismissed.[208] After the applicant lodged a complaint before the Labour Office, the plaintiff asked her to return, however, the applicant refused to do so and lodged a case before the IDT.[209] The IDT held that the dismissal was unfair, and the employee was entitled to refuse to go back to work after she has been dismissed.[210]

6.4.2.2 Parental Leave Law 47(I)/2012

Parental Leave Law 47(I)/2012, which implemented EU Council Directive 2010/18, replaced Law 69(I)/2002.[211] According to article 9(a) of Law 47(I)/2012, the aim of parental leave is for care and nurture of children. This provision illustrates that the influence of EU, which promotes parental responsibilities, is stronger than the impact of ILO Convention N.156 that introduces the wider scope of 'family responsibilities'. However, after the new Directive on Work-Life Balance for Parents and Carers, which has not been implemented yet at domestic level, it seems that both Cyprus and the EU have learned from the ILO. The protection under Law 47(I)/2012 covers workers for a period of eighteen weeks, who are parents with children up to eight years old. In case of a widowed parent, the period of parental leave may last up to twenty-three months.[212] If the child is disabled, then the parent is entitled to take parental leave

[205] *Georgia Savvidaki v. Katerina Travel and Tours Ltd.* (6/6/2017) App. N. 710/12.
[206] Ibid, article 7.
[207] Law 117(I)/2017.
[208] *Nina Magdalide v. A.G. Candles Restaurant Ltd.* (24/6/2016) App. N. 683/2011.
[209] Ibid.
[210] Ibid.
[211] Law 47(I)/2012.
[212] Ibid, article 4(1).

up to the age of 18, whereas if the child is adopted then the parent is entitled to take up to the point his/her child reaches the age of 12.[213]

The employer is also not allowed to dismiss an employee during this period of parental leave, which shows the social aspect of EU law as transposed in the domestic context.[214] The worker is also eligible to request working time and organizational flexible arrangements after the end of parental leave for a specific period of time.[215] Law 47(I)/2012 states that the worker is entitled to return to the same or equivalent job position after the end of parental leave, however, Law 47(I)/2012 fails to define the term 'equivalent'.[216]

6.5 Regulation of social security system

Social security is recognized as a fundamental right in the Constitution of Cyprus, which includes social insurance, labour protection and assistance to the poor.[217] The term 'social security' (in Greek: 'κοινωνική ασφάλεια') was initially introduced in the 1948 Universal Declaration of Human Rights (article 22). Many legal scholars attempted to define the concept of social security that historically emerged after the introduction of social insurance schemes. For example, Sinfield defined social security as 'a state of complete protection against the loss of resources'.[218] Another definition of the term was developed by Berghman, who described social security as 'a situation of complete protection against human loss'.[219] Angelos Stergiou characterized social security as 'a wider and evolutionary superior scheme to social insurance'.[220]

The recognition of social security is a response to 'human vulnerability', which is at the heart of human rights, and promote the principle of human dignity.[221] The close link of social security and human dignity is reflected in article 9 of the Constitution of Cyprus, which enshrines both, the right to human dignity and social security.[222] The main purpose of social security system is to provide income security to workers and their families when there are

[213] Law 47(I)/2012.
[214] Ibid, article 10(1).
[215] Ibid, article 10(2).
[216] Ibid, article 10(2).
[217] Constitution of Cyprus, article 9.
[218] Pieters D., *Introduction into the basic principles of social security* (Springer 1994), p.2.
[219] Ibid, p.2.
[220] Stergiou A., *Insurance Law* (2nd edn, Ekdoseis Sakkoula A.E. 2014), p.40.
[221] Ibid; Constitution of Cyprus, article 9.
[222] Ibid.

interruptions of income, whether short-term (e.g. sickness or disability) or longer-term periods of interruption (such as unemployment or employment injury). These interruptions occur because of socio-economic changes in the post-industrial society, which create new social risks. The term 'social risk' is defined by Patrina Paparrigopoulou-Pechlivanides, a Greek labour law scholar, as 'a future and uncertain event, occurring despite the human being's willingness, which causes loss and creates needs'.[223] The concept of social security embraces the principle of comprehensiveness, which means that social security system shall provide comprehensive protection against all social risks (also known as 'contingencies' at ILO level), which may threaten income security and dignity.[224]

There are two main systems of social security that set the foundations for the development of national social security systems across the globe: the Bismarck and Beveridge models, the latter being discussed in the context of ILO Convention No. 102 above. Danny Pieters observed that it is common for States to converge the features of these two models, creating an amalgam of social security system.[225] Before examining the Cypriot social insurance model, it is important to understand the core characteristics of the two core systems. The Bismarck model was developed by Otto van Bismarck, who was the Prime Minister of Proussia, and created a centralized and unified system to protect all economically weak groups.[226] The main characteristics of the Bismarck system are the following: the insured persons are employees or gainfully employed, the contributions are based on salaries and the financing is via contributions.[227]

The Beveridge Plan (Report 'Social Insurance and Allied Services) was drafted by Lord William Beveridge in 1942, who was recruited by the British Government to restructure the UK welfare system.[228] The Beveridge Plan is also known as the system of 3U: Unity, Uniformity and Universality.[229] The plan included the establishment of the National Health

[223] Paparigopoulou-Pechlivanides P., *Social Insurance Law* (2nd edn, Nomiki Vivliothiki 2016), p.17.
[224] NESRI, Human right to social security, info sheet n.1 < https://www.nesri.org/sites/default/files/Right_to_Social_Security.pdf> accessed 13 July 2019.
[225] Pieters (n.218), p.8.
[226] Ibid.
[227] CESifo DICE Report 4/2008, 'Bismarck versus Beveridge: a comparison of social insurance systems in Europe' <http://www.cesifo-group.de/ifoHome/facts/DICE/Social-Policy/Pensions/General-Structure/bismarck-beveridge-dicereport408-db6/fileBinary/bsimarck-beveridge-dicereport408-db6.pdf> accessed 13 July 2019.
[228] BBC official website <http://www.bbc.co.uk/history/historic_figures/beveridge_william.shtml> accessed 19 October 2018; UK national archives official website <http://www.nationalarchives.gov.uk/cabinetpapers/alevelstudies/1940-origins-welfare-state.htm> accessed 13 July 2019.
[229] Stergiou (n.220), p.14.

System (NHS), which provides medical treatment for all.[230] The main characteristics of the Beveridge Plan are the following: the scheme includes the entire population, the State budget constitutes the main source of funding and the individuals are called for uniform and lump-sum contributions.[231] It could be concluded that Beveridge embraced the principle of human dignity as its plan provided a minimum standard of decent living.

Social security protection in Cyprus uses two 'techniques': social insurance (in Greek: 'ασφάλιση) and social assistance (in Greek: 'κοινωνική παροχή').[232] The difference between these two techniques is clear. When there is a social risk, the individual is entitled to social insurance benefit, without applying a means test – in other words, without checking whether the individual actual needed the entitlement.[233] Whereas, the entitlement to social assistance benefit is depended on a means test.[234] Social assistance is defined by Vladimir Rys as 'any action of public authorities designed to help the destitute citizen'.[235] Historically, social assistance emerged from ancient ages (800-500 B.C.), when rulers of City-States in Ancient Greece distributed money and food to gain votes as a form of social assistance.[236]

Cypriot governmental authorities could be characterized as the key actor for social security protection, because social security is tightly depended on public resources (funds).[237] Even if social insurance also entails contribution from other actors (i.e. employers/employees), social welfare systems are entirely dependent on the public budget. Due to social risks, the social security system should aim to provide income security to ensure that individuals would be able to enter, remain or re-enter labour market.

In the post-crisis era, the allocation of public funds for social security becomes an issue since there is an increased pressure on public resources. For this reason, the influence of the 2013 MoU has a direct effect to social security system because Troika introduced measures to curtail the public expenditure – for example, to minimize the public health expenses. Cyprus was characterized as the State that devotes a low share of resources to the health sector and relies heavily on private out-of-pocket expenditure to finance health care services, compared to the

[230] BBC official website (n.228).
[231] CESifo DICE Report 4/2008 (n.227).
[232] Pieters (n.218), p.6.
[233] Ibid.
[234] Ibid.
[235] Rys V., *Reinventing social security worldwide: Back to essentials* (2010, The Policy Press, University of Bristol), p.12.
[236] Ibid.
[237] White S., 'Ethics' in Castles F.G., Leibfried S., Lewis J., Obinger H., and Pierson C. (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press 2010), p.24.

rest of EU Member States.[238] The introduction of the NHS will avoid this pressure that is put on the public budget, by enabling the Government to coordinate the public and private systems. The 2013 MoU set as a condition for the first tranche of loan that the Government of Cyprus shall reduce the health expenditure and introduce the NHS in stages.[239] The Cypriot health system was shifted from Social Security Health System (SSH) to National Health System (NHS or GESY), which was launched on 1st of July 2019.[240] In practical terms, this means that all workers will have to contribute to the health system.

6.5.1 Social Insurance Law 59(I)/2010

The Cypriot social insurance system is currently regulated by Insurance Law 59(I)/2010. However, the primary Cypriot instrument for social insurance regulation was Chapter 354 of 1959 that responded to the following social risks: marriage, sickness, maternity, unemployment, invalidity and old-age.[241] Social insurance legislation was amended multiple times after Chapter 354 and addressed new social risks, including single-parenthood benefit, child benefit, paternal benefit and surrogate mother as part of maternity benefit. In particular, Social Insurance Law covers the following social risks that are related to this research project: unemployment benefit; maternity allowance; maternity grant; sickness benefit, employment injury benefit (which includes injury benefit and disability benefit).[242]

The social insurance scheme is developed to correct *inter alia* the gap of private insurance. The distinction between social insurance and private insurance is that the rules of social insurance are introduced by law, whereas the rules of private insurance are agreed in contractual agreements.[243] According to Angelos Stergiou, private insurance is not addressed to low-income workers, which means private insurance widens income inequality and increases the gap between rich and poor.[244]

The old-regime of social insurance (i.e. before 1980) was solely based on a flat-rate of compulsory contribution.[245] However, the current Social Insurance Scheme, which was introduced in 1980, is based on two parts: the flat-rate scheme (which also constituted the old-

[238] ELSTAT official website, <https://ec.europa.eu/eurostat/statistics-explained/index.php/Healthcare_expenditure_statistics> accessed 13 July 2019.
[239] EAP Cyprus (n.85), p.84.
[240] Law 89(I)/2001.
[241] Chapter 354 of Cyprus, 1959.
[242] Law 59(I)/2010.
[243] Stergiou (n.220), pp.7-8.
[244] Ibid.
[245] Chapter 354 of Cyprus, 1959.

regime of social insurance prior to 1980) and the supplementary earnings-related contributions.[246] The Social Insurance Act 59(I)/2010 set a gradual increase of compulsory contributions – e.g. 20.2% in 2014 to 26.7% in 2039.[247] A key distinction remains as to the percentage of compulsory contribution between the categories of workers. In 2017, the 'salaried worker' and his employer shall contribute 7.8% of the salary and the State shall contribute 4.6% of the salary.[248] Whereas, the self-employed worker shall contribute 14,6% and the State shall contribute 4.6% of his income.[249]

The Social Insurance Scheme of Law 59(I)/2010 covers all workers, embracing the principle of universality, which constitutes one of the core features of the Beveridge system. The Administrative Authority (in Greek: 'Διοίκηση') has the discretion to classify the applicant for social insurance into three categories: 'salaried worker', 'self-employed worker' or 'optionally insurance person'.[250] The category of 'salaried workers' might refer to the broad concept of 'employees', however, Law 59(I)/2010 explicitly explains which types of 'employees' fall into this category, including: public, semi-public and private employees, workers falling under EU Regulation 883/2004 and participants in ALMPs of Law 125(I)/1999.[251] The main principle of social insurance scheme, which seems as a measure to minimize the public expenditures, is the right to no more than one benefit. This means that if the beneficiary is eligible for two or more benefits (e.g. employment injury and maternity), then he will only receive the benefit with the higher rate.

There is a distinction of rights and responsibilities based on the category of the individual as set in Law 59(I)/2010. The 'salaried workers' and 'optionally insured people' are entitled to access all social insurance benefits, which are provided in Law 59(I)/2010.[252] Whereas 'self-employed workers' are not entitled to receive unemployment and employment injury benefits.[253] The 'optionally insured person' (in Greek: προαιρετικά ασφαλισμένος του εσωτερικού) means the person that opted to stop working before the beginning of his pensionable year and he is willing to continue to pay contributions to secure his pension rights.[254] The 'optionally insured person working abroad' (in Greek: 'προαιρετικά

[246] Social Insurance Law 59(I)/2010, article 21.
[247] Ibid, article 5(1).
[248] Ibid, article 5(1).
[249] Ibid, article 12.
[250] *A/F Papalazarou Ltd. v. Republic of Cyprus via Director of Social Insurance* (1995) 4 C.L.R. 560.
[251] Law 59(I)/2010, table 1; Law 125(I)/1999.
[252] Law 59(I)/2010.
[253] Ibid, article 31(1).
[254] Ibid.

ασφαλισμένος εξωτερικού') is only entitled to the social grants (i.e. birth grant and funeral grant).[255] The idea of accessing different benefits based on the classification of the worker into a category deviates from the universal coverage for social protection for all, which is fiercely promoted by the human rights institutions (ILO and CoE).

It appears that the distinction between 'salaried worker' and 'self-employed worker' creates problems. The Supreme Constitutional Court under article 146 of Constitution of Cyprus has the exclusive jurisdiction to examine any application that deals with actions or omissions that are 'made in excess or in abuse of powers vested in the Administrative authorities (i.e. the Department of Social Insurance).[256] The Constitutional Administrative Court (CAC) shall: confirm the act or omission; declare it null and void and no effect or whatsoever; or request the omission to be performed.[257] The CAC had to decide in multiple cases whether the administrative bodies had acted properly, however the CAC is not entitled to decide on the merits of the case – i.e. who is employee. In *Tritonia Developers*, the applicant claimed that the Department of Social Insurance wrongly categorized him as 'salaried worker' as described in Law 59(I)/2010, because the applicant *inter alia* did not receive 13th salary and did not pay any contributions as the rest of her employers.[258] Whereas, the Manager of the Department claimed that the applicant was rendered as 'salaried worker' because he was receiving a fixed monthly salary, he had a fixed working time schedule and his performance was supervised by the Director.[259] The CAC held that thee Administrative Body acted properly and collected all the necessary evidence, which prove why the applicant was considered as a 'salaried worker'.[260] The fact that the CAC referred to the *Prousi* judgment, in which the Supreme Court discussed the concept of employee, illustrates the cognitively open feature of social security system.[261] The definition of employee and the required tests were developed by the Cypriot labour system. However, the social security system, in a process of self-reflection, adjusted the definition of employee in its context.

However, this communication between the systems, in which social security system uses a concept (the concept of employee) as developed in the employment security system, is not consistent because in *A/FOI Papalazarou Ltd.*, the CAC did not refer to the definition of

[255] Ibid.
[256] Constitution of Cyprus, article 146(1).
[257] Ibid, article 146(4).
[258] *Tritonia Developers Ltd. v. Republic of Cyprus via Ministry of Labour and Social Insurance* (app. n. 436/2010).
[259] Ibid.
[260] Ibid.
[261] *Prousi v. Redundant Employees Fund* (1988) 1 C.L.R. 363.

employee as set in *Prousi*. Instead, the CAC examined the allegations of the applicant, who claimed that the Administrative authorities should have categorized him as 'a salaried worker', since he was supervising the rest of employees.[262] In other words, it appears that the CAC, which held that the Administrative authority omitted to collect all the appropriate evidence before categorizing the worker as 'self-employed worker', acts only within the limits of its discretionary power.[263]

There are cases where the Administrative Authority of Social Insurance Fund failed to categorize the worker properly as a 'salaried worker'. Such cases could create two problems: firstly, the employer-the employee or the self-employed worker will not pay the appropriate contributions holding them criminally liable; and secondly, the worker, who was mistakenly considered as a self-employed worker will be excluded from unemployment and employment injury benefits. It appears that even the CAC, which is competent to decide on cases on social security law as they fall into the scope of administrative law, has jurisdiction to annul an action of the Social Insurance Department, the IDT has no competence over social security disputes, which may also affect employment security norms. In *Stephanis Antoniou*, the applicant was working as aesthetician (beautician) for Christiana Aristidou, who announced her dismissal over the phone without notice.[264] After her dismissal, the applicant lodged an application for unemployment benefit before the District Labour Office, where they informed her that her employer was Dremasol Enterprises, who did not pay the obligatory contributions to the Social Insurance Fund.[265] The IDT held that it has no competence to issue an Order, according to which the employer would be obliged to pay the required contributions to the Social Insurance Fund or pay the amount of unemployment benefits that the applicant did not receive because her employer failed to sign the required documents by the Social Insurance Fund, so that the applicant would have been able to receive the appropriate unemployment benefit.[266] This shows that the two autopoietic systems, which developed divergent judicial procedures, set the boundaries of their competence, illustrating that they are not enough cognitively open.

The fact that a self-employed worker is not entitled to receive unemployment benefits according to Law 59(I)/2010, means that the self-employed person, who does not gain an adequate amount of wages, might not be able to pay the compulsory contributions, which is

[262] *A/F Papalazarou Ltd. v. Republic of Cyprus via Director of Social Insurance* (1995) 4 C.L.R. 560.
[263] Ibid.
[264] *Stephanis Antoniou v. 1. Christianas Aristidou 2. Dremasol Enterprises Ltd.* (4/5/2011) App. N. 55/11.
[265] Ibid.
[266] Ibid.

quite a large percentage (14% of his earnings). Since the failure to pay the contributions could hold the individual criminally liable, as laid in the Cypriot Criminal Code (Chapter 154), the worker might choose one of the options: to find another job as self-employed, or to stop being self-employed and either to make a transition from self-employed to salaried worker or remain as unemployed person if it is not possible to find another job.[267] Educational benefits and ALMPs could play a key role at this point to enable the worker to remain in the labour market, illustrating that social security requires a mixture of techniques (social assistance and social insurance). In Cyprus, the educational benefit, which is a type of benefits that is not regulated at the other systems (ILO, EU, CoE), appears as student grant (in Greek: 'φοιτητική χορηγία) that is tightly linked to the status of 'full-time or part-time student', but it excludes distant learning and language learning programmes.[268]

The unemployment benefit, which acts as a safety net and facilitates the transitions of workers in the labour market, only lasts for a period of 156 working days for each interruption of employment.[269] This provision is in line with ILO Convention N.102 that refers to 'qualified period', however, the Convention fails to describe this term or set minimum standards.[270] This means the system forces the individual to return to labour market and accept any job offer made by the Human Resource Development Authority (HRDA). The question that arises is to what extent these job offers of HRDA enable the individual to make the transition from unemployment to employment or creates a vicious cycle, which entail the following sequence: unemployment-HRDA programme-return to unemployment. The current schemes (of 2019) by the HRDA are addressed to people: who are entering the labour market for the first time, who are long-term unemployed (i.e. job-seekers for more than a year), who are holders of the Minimum Guaranteed Income or graduates from tertiary education.[271] However, none of these programmes set an obligation for the employer to recruit the individual after the end of the schemes, which lasts between 3-12 months.[272]

According to Vys, 'the difficulty of integrating social and economic policies depends to a large extent on the state of the socioeconomic well-being of society'.[273] This seems correct because the realization of Cypriot ALMPs (i.e. the Schemes Developed by the HRDA) as soft-law

[267] Chapter 154 of Laws (1959).
[268] Law 203(I)/2015, article 2.
[269] Law 24/67.
[270] ILO Convention N.102, article 24.
[271] Official website of HRDA, < http://www.hrda.org.cy/el/katartisi/ola-ta-sxedia> accessed 2 August 2019.
[272] Ibid.
[273] Rys (n.235), p.12.

processes, is tightly depended on the public budget, which means the ALPMs take the form of re-regulation. Since the regulatory framework of systems is confronted by social prejudices – e.g. the older workers are not productive enough, soft-law policies aim to mediate this normative gap. The main source of funding of ALMPs for the period 2014-2020 is the European Stability Finance (ESF). In the Europe 2020 Strategy, the Cypriot 'Employment, Human Resources and Social Cohesion Programme', which entails investment of more than 163 million euros, aims *inter alia* to improve Public Employment Services (PES) and employment opportunities.[274]

The system adopted protective measures to reduce the risk of facilitating transition from employment to inactivity, since there is an imminent risk as there is no minimum income for all occupations. The eligibility for Minimum Guaranteed Income (MGI) requires registration of the individual as unemployed in the PES, acceptance of any job proposed by the HRDA that can perform and non-voluntarily termination of his employment. The MGI was introduced by Law 109(I)/2014 as part of the 2013 MoU measures to decrease the rate of poverty.[275] Even if the MGI does not play any key role for facilitating transitions from job to job, it acts as a barrier for transition from unemployment to inactivity, the MGI requires the beneficiaries to act as job-seekers and take part into ALMPs. Apart from MGI, Law 95(I)/2006 on social assistance excludes from the scope of protection the people that choose to remain inactive.[276]

Employment Injury

The employment injury benefits are divided into three categories: temporary incapacity benefit that covers a 12-month period, disability pension or grant and death grant.[277] There are no conditions to be met for granting the employment injury benefits, apart from the following: the accident occurred in the workplace or in transit to/from workplace and occurred within the working hours; or he suffered from an occupational disease.[278] In accordance with ILO Convention N.121, Cyprus adopted the Regulation 4437 of 2010 to set out the occupational diseases and the types of injuries that fall in the scope of Law 59(I)/2010.[279] The Administrative Authority decides whether the applicant is eligible for disability grant or pension based on the degree of disability. Disability grant is paid to applicants with 10-19%

[274] EU official website, <http://ec.europa.eu/regional_policy/en/atlas/programmes/2014-2020/cyprus/2014cy05m9op001> accessed 13 July 2019.
[275] EAP Cyprus (n.85).
[276] Law 95(I)/2006, article 3(10)(b).
[277] Law 59(I)/2010.
[278] Ibid, article 40(5).
[279] Social Insurance Law 59(I)/2010; Regulation 4437/2010.

of disability.[280] Whereas disability pension is granted to the applicants with disability degree between 20-100%.[281] The full amount of pension is payable to beneficiaries with 100% disability, whereas when the disability degree is less than 100%, the amount is proportional to the actual degree of disability.[282]

As *prima facie* these norms seem to be clear and promote the right to social security benefits in case of employment injury, as enshrined in ILO Convention N.121, the ESC/RSC and the EU Framework Directive 2000/78. Instead, these norms entail practical complexities as the entitlement of the grant or pension and the amount of the benefit is tightly depended on the disability degree that is at the discretion of the Insurance Fund Authorities. ILO Convention N.159, which was also ratified by Cyprus, describes the disabled person as 'an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment', however, it does not deal with disability degrees.[283] In this context, the CAC dealt with many cases, in which the Administrative Authorities cut the grant of benefits because the applicants did not satisfy the conditions.[284]

Maternity benefit and maternity allowance

The maternity allowance as described in Law 59(I)/2010, is payable to an insured person within the period of absence from employment (i.e. 18 weeks or an additional week for every 21 days if the infant is hospitalised).[285] Law 59(I)/2010 embraces the principle of universality, as reflected in ILO Convention and ESC/RSC, since it covers all mothers (i.e. biological mothers, mothers with an adopted child and surrogate mothers).[286] This means the domestic system goes a step beyond the EU, which does not cover infants through surrogate arrangements as illustrated in *Z.* (C-363/12) and *C.D.* (C-167/12) (for further analysis, see chapter 5). Similarly, the maternity benefit, whose amount is 6% of the wages, is granted to any mother if the applicant or her spouse has completed the appropriate period of qualification.[287]

The flexible approach of the EU towards social security seems to be realistic. The EU regulation on social security aims to coordinate a diversity of non-homogeneous social security

[280] Law 59(I)/2010, Table 4, article 26, Part 4.
[281] Ibid.
[282] Law 59(I)/2010, Table 4, article 26, Part 4.
[283] ILO Convention N.159, article 1(1).
[284] *Giorgos Kaoullas v. Republic of Cyprus* (App. N. 407/2009).
[285] Law 59(I)/2010, article 29.
[286] Ibid.
[287] Ibid.

systems. Understanding that these domestic social security systems are normative and procedural complex systems, which evolved their own internal social security standards to address similar societal problems, such as infertility and ageing, the Member States self-regulate, embracing the EU principle of conferral. This approach reflects the functional differentiation of social security systems.

Nevertheless, the Ombudsman (in Greek: Επίτροπος Διοίκησης και Ανθρωπίνων Δικαιωμάτων), which was established by Law 3/91, examined 130 complaints in 2016 that refer to maternity issues, which did not reach up to the Court. 15% of the complaints were dealing with issues regarding work-life balance of working mothers, which shows that the labour market fails to adjust the needs of working mothers into the working environment.[288] This reflects that soft-law procedures could fill the gap of hard-law procedures, since such procedures are more time-consuming and expensive.[289]

6.6 Concluding Remarks

The labour system of Cyprus, which appears as an autonomous and self-regulatory system, reflects its own peculiarities and attempts to respond to its own new social risks or societal problems. It combines a range of legal sources, although the influence of each source is not homogenous. The three regulatory systems: the UN/ILO, the CoE and the EU, which communicate with the domestic system through hard-law and soft-law procedures, have different strengths of influence in the domestic normative labour framework. The stronger influence of the three systemic mechanisms belongs to the EU. The ILO, which diachronically constitutes the classic pioneer of social justice and labour protection, appears as a polite actor, whose regulation is softer and sometimes covered (or replaced) by the influence of the other institutions. In addition, the CoE, which promotes human rights at regional level, appears almost as non-existent in the domestic context. The reasons that lie behind the strong influence of the EU include the binding force of the instruments and the judicial mechanisms of the EU, whose decisions create binding norms. Despite the existing divergences between the systems (e.g. who is entitled maternity benefit), all systems set the principles of equality and non-

[288] Official website of Ombudsman, < http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/7C3119FC52E3EAD7C225804F00372C08?OpenDocument> accessed 13 July 2019.
[289] Ibid.

discrimination in their foundational domains to respond to the social aims of injustice and poverty.

Employment security appears as a complex concept, which entails the interaction with the social security system. In modern times, there is a perceived need to shift from job security to employment security to flexilibilize the labour market and achieve better employment opportunities. Job security is successfully promoted by the Law 24/67 and the Cypriot Courts. It seems that hard-law norms of job security have a stronger impact on the society in Cyprus. Nevertheless, it appears that the systemic deficiencies of the Cypriot systems still create vicious circles and fail to secure workers decent jobs. This happens because, *inter alia*, the social security system depends on public resources, which have been limited in the Cypriot economic crisis. Through these interactions, social dialogue could act as a reflexive mechanism and mediate the tensions created between job security and employment security – e.g. regarding the period of notice. It is therefore curious that social dialogue including collective bargaining and industrial action, which has such considerable significance for Cyprus, appears to be neglected in EU hard and soft law norms.

Chapter 7: Conclusion

This research study has explored the multi-level regulation of employment security and social security systems, applying a systems theory of reflexive law as developed by Gunther Teubner and Ralf Rogowski. The central claim advanced in this thesis has been that the regulatory systems have the capacity to learn from each other, but as self-referential systems, they set 'systemic limits' on their procedural norms.[1] The transnational and national regulatory systems, which are examined in this study (i.e. the UN/ILO, the CoE, the EU and Cyprus), are 'functionally different' and produce their own procedures as their core elements.[2] However, they correlate in different ways and endorse the mutual principles of equality and human dignity in their foundational domains,[3] as they seek to reach wider social goals that are related to their environment (e.g. combat poverty, unemployment and social exclusion).

From a flexicurity perspective, employment security, which constitutes the ability to enter, remain in, or re-enter employment, could be achieved through reflexive communication with social security systems. As Manfred Weiss articulated: 'The modern world of work is characterized by instability of employment. […] A satisfying legal response to such a challenge […] needs a close interaction between rules of labour law and social security law'.[4] However, flexicurity, which is an EU-oriented form of re-regulation, tends to promote the bare notion of employability (the commercial flexicurity aspect), rather than the over-arching aim of employment security (as set in the 2007 EC Communication).[5] It seems that flexicurity, which aims to make workers more adaptable or employable to ensure that they can swiftly transition in the labour market, would not necessarily encompass job security protections.

In this thesis, I suggest that the Republic of Cyprus, which aims at further recovery in the post-crisis era, should shift its focus from job security and the bare notion of employability (as a way to increase competitiveness) to the promotion of employment security (integrating the concept of decent work). This shift is not easy because employment security and job security,

[1] Rogowski R., *Reflexive labour law in the world of society* (Edward Elgar Publishing Limited 2013), pp 39 and 170.
[2] Teubner G., 'Autopoiesis in law and society: a rejoinder to Blankenburg' (1984) 18(2) *Law and Society review* 83, p.91.
[3] For example, ILO Constitution 1919, ECHR TEU, Constitution of Cyprus,
[4] Weiss M., 'Collective Exit Strategies: New Ideas in Transnational Labour Law' in Davidov G. and Langille B. (eds) *The Idea of Labour Law* (Oxford University Press 2011), p.49.
[5] European Commission, Towards Common Principles of Flexicurity: More and better jobs through flexibility and security - Impact Assessment SEC (2007) 861, p.5.

which are intimately inter-connected concepts, could sometimes collide. In 2019, the Government of Cyprus announced that the rate of unemployment decreased, reaching its lowest levels in the last eight years.[6] The push of the Cypriot Government to tackle unemployment, ensuring swift transitions from unemployment to employment, does not necessarily mean that individuals will be able to remain in employment. As social security is dependent on public funds, there is an increased pressure on these resources to curtail public deficit through tackling unemployment. However, this thesis suggests that this push, which is driven by budgetary interests, shall set as its over-arching aim to promote an inclusive labour market for all, in which all individuals will be able to swiftly transition in the labour market, without being exposed to the risk of unemployment or a 'race to the bottom' in terms and conditions of employment.

Employment security, which includes the ingredient of employability, remains a complex and contested concept from a terminological and normative perspective. The transnational regulatory systems that are analysed in this study (UN/ILO, CoE, EU), developed their own procedures to promote employment security. It appears that the UN and the CoE endorse employment security standards as part of the human rights regime, and they are primarily interested in the regulation of employment security in the field of non-discrimination. The EU also protects against discriminatory dismissals, there is also further regulation of the procedures for economic dismissals in the EU labour market through Directives 98/59, 2001/223 and 2008/94, and attempts to increase workers' protection in this context.

The UN human rights treaties (such as ICESCR and CRPD) integrated employment security as a constituent component of the right to work, whose normative content is interpreted by the treaty bodies (such as the CESCR) in the light of ILO instruments.[7] As Rogowski stated 'human rights are invidualistic and inclusive and play an important role in the establishment of a world legal system'.[8] This articulation reflects the approach of the UN human rights treaties, which seek to ensure that UN Member States shall respect, protect and fulfil the right to work.[9] In this spectrum, the ILO, which is 'seen as the universal basis of the international body of

[6] Official website of the Statistical Service of the Republic of Cyprus, <https://www.mof.gov.cy/mof/cystat/statistics.nsf/labour_32main_en/labour_32main_en?OpenForm&sub=2&sel=1> accessed 5 August 2019.
[7] See in section 3.2. more about the UN, the employment security and the right to work.
[8] Rogowski (n.1), p.17.
[9] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, p.4.

labour law',[10] sets minimal standards for employment security. Furthermore, the ILO Termination of Employment Convention N.158, which is inevitably a landmark transnational regulatory instrument for job protection, does not seem to adopt an inclusive approach because: first, the Member States could exclude specific categories of workers from the scope of protection (for example, public servants in Cyprus); and second, only some of the prescribed categories of workers could be excluded after prior consultations and negotiations.[11] The Cypriot Law 24/67, which endorsed the principles of ILO Convention N.158, is a key example of this regulatory deficit. As explained in chapter 6, Law 24/67 provides weak protection to newer workers because it excludes from its scope of protection the workers who completed a period of employment no less than 26 weeks of employment.[12]

The CoE appears more concerned with human rights protections and less worried about employment security. The ECtHR through its evolutive interpretative approach (which sees the ECHR as a 'living instrument'),[13] extended the scope of the ECHR, which primarily protects civil and political rights, to cover job security safeguards when they fall in the ECHR substantive provisions (articles 8-11 ECHR). The ECHR set two conditions for justification of dismissals in violation of Convention rights: the interference shall be in accordance with law and the measure shall be necessary in a democratic society.[14] These conditions are interpreted *ad hoc* by the ECtHR. To explain, the ECtHR takes different factors into account to examine whether the determined measure (dismissal) is legitimate and proportionate in a democratic society, balancing individual rights and collective interests (e.g. public order).[15] For example, the ECtHR in the *Fuentes Bobo* case examined whether the dismissal of the applicant because he criticized in public his employer (exercising his right under article 10 ECHR) was necessary in a democratic society.[16] In this context, the ECtHR decided that the applicant did not breach the professional duty of loyalty,[17] which is recognized as a valid reason for dismissal under ILO Convention N.158 (article 5) and Cypriot Law 24/67.

Furthermore, the ESC and the RSC, which provide a comprehensive list of socio-economic rights, enshrine ingredients of employment security in the composite right to work, which

[10] Weiss (n.4), p.51.
[11] ILO Convention N.158, article 2.
[12] Law 24/67, article 3.
[13] *Tyrer v The United Kingdom* (1978) 2 EHRR 1.
[14] ECHR, articles 8-11.
[15] See more examples in section 4.2.1.2.
[16] *Fuentes Bobo v. Spain* App N.39293/98 (ECtHR, 29 February 2000).
[17] Ibid.

includes access to employment and job security protections.[18] The ESC/RSC provide *inter alia* the right to notice of dismissal, which could create tensions between job security and the facilitation of transitions in the labour market (employment security).[19] In addition to the latter, the RSC provides further protection for termination of employment appears (job security) as a distinct right.[20] The recognition of job security as a separate right, which seems to be a remarkable development, is also endorsed in the EUCFR.[21] However, the EUCFR further reflected the need to expand the conceptualization of employment security by endorsing article 15 EUCFR (right to choose an occupation and right to engage in work) and article 16 EUCFR (right to conduct business).

Regarding economic dismissals, the EU procedures for Collective Redundancies (Directive 92/85) and Transfer of Undertakings (Directive 2001/223) primarily promote job security. Whereas Insolvency Procedures (Directive 2008/94) promote employment security through guaranteeing payments of individuals, which aims to provide protection of outstanding payment to workers rather than persuading employers that are in the state of insolvency to preserve job security. By way of contrast, article 28 RSC, as interpreted by the ECSR, includes termination due to bankruptcy or insolvency.[22] Whereas, the ILO, which does not distinguish the normative framework for individual and collective dismissals, just introduces two procedures that are required to be followed in case of operational 'economic, technological, structural or similar nature' (i.e. consultations with workers and employers' representatives and send a notification to the competent authority).[23]

In this context, this thesis also suggests the need to promote collective bargaining (which includes the right to strike) as a stronger form of social dialogue in this context, as opposed to mere information and consultation. Through collective bargaining, it would be more likely for social actors to change the existing procedures as they will possibly have equal bargaining power. The procedures of negotiations and consultations (as a form of social dialogue) could be used a way to represent the interests of workers and mitigate the risk or the negative impact from economic dismissals (such as, reduce the number of dismissals or suggest LLL as a way to increase competitiveness and avoid dismissals).[24] However, the absence of access of

[18] See more about the ESC/RSC rights and employment security in section 4.2.2.
[19] ESC, article 4(4); RSC, article 4(4).
[20] RSC, article 28.
[21] EUCFR, article 30.
[22] *Finnish Society of Social Rights v. Finland* (Complaint No. 107/2014), para.49.
[23] ILO Convention N.158, articles 4 and 13.
[24] See more about the forms of social dialogue in section 2.3.3.

collective bargaining as a precondition for economic dismissals, seems problematic. In the Cypriot legal system, social dialogue, including collective bargaining and industrial action, has such considerable significance, which appears to be neglected in EU hard and soft law norms.[25]

The Cypriot legal system showed its strong prevalent capacity to self-regulate as Cypriot Courts favour job security protections. The IDT and the SCC, applying the reasonableness test, have repeatedly confirmed that dismissal is as a measure of last recourse.[26] For example, the IDT in the case of *Stephanou Pitsillidi,* held that, even if it has been proven that the cash shortage was caused by the employee's misconduct, the employer should have taken alternative measures, before taking the final decision to dismiss the applicant.[27] The concept of employment security, which is not fully accepted in the Cypriot system, is more complex than job security protections. In the era of economic crisis, it seems that austerity measures, which were promoted in the realm of fiscal Programmes by Troika, prioritized competitiveness and budgetary interests over labour and social security protections.[28] It is interesting that Cyprus, which is a Member State of the ILO that fiercely promotes decent work through its Agenda, did not accept article 24 RSC that safeguards the right to decent work.

This thesis also argues that a sustainable recovery solution for an inclusive labour market in Cyprus, in which all individuals will be able to swiftly transition in the labour market, entails a shift from the Aristotelian formal type of equality to the 'multidimensional concept' of substantive equality.[29] It appears that the transnational regulatory systems are more interested about non-discrimination rather than employment security. The UN human rights treaties and ILO Conventions N.158 and N.111 provide similar non-valid grounds of discrimination.[30] However, ILO Convention N.111 sets non-discrimination grounds to ensure transitions in the labour market, which includes protections from prohibition from dismissal and access to the labour market. Whereas, ILO Convention N.158 just prohibits unfair dismissals on different discriminatory grounds (sex, race, nationality and sexual orientation).

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[25] See more about social dialogue in Cyprus in section 6.3.

[26] *Ekdotikos Oikos Dias Ltd. v. Giorgou Kogia* (2006) 1B C.L.R. 1227 – as stated in the *Ekdotikos Oikos* case, instant dismissals should be justified only in cases of serious misconduct*; Kanika Developments Ltd. v. Louca* (2004) 1 C.L.R. 603; *Anastasia Kasapi v. Technoplastics Ltd.* (1992) 1 C.L.R. 919.

[27] *Panayiotis Panayiotou v. The Regis Milk Industries Ltd.* (12/3/2013) App. N. 211/09; *Panayiotis Panayiotou v. The Regis Milk Industries Ltd.* (12/3/2013) App. N. 211/09; *Emily Stifler v. ERMES DEPARTMENT STORES PLC.* (5/10/16) App. N. 803/2012.

[28] See section 6.2.3 for further details about the Economic Adjustment Programme (EAP) and the Post-Programme Surveillance (PPS).

[29] Fredman S., 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) *Human Rights Law Review* 1, pp.9-11.

[30] See more about the non-discriminatory grounds in ILO Conventions N.111 and N.158 in section 3.2.3.

Article 1(2) of the ESC/RSC as interpreted by the ECSR provides prohibition of all forms of discrimination in employment.[31] The RSC provided additional discriminatory grounds, which includes disability (article 15 RSC), sex (article 20 RSC) and acting in the capacity of a workers' representative (article 28 RSC). It appears that article 28 RSC converges with article 5(a) of ILO Convention N.158, which explicitly prohibits dismissals on grounds related to trade union membership and collective bargaining. [32] However, trade union membership and collective bargaining are not within EU competence or protected under EU law as a protected ground for dismissal.

The EU adopted multiple dispersed instruments to regulate individual dismissals in the field of non-discrimination, which are implemented at the domestic (Cypriot) level. Equal Treatment in Employment and Occupation Directive 2006/54, which sometimes examines matters that fall in the scope of Maternity Directive 92/85 and Parental Leave Directive 2010/78 (which is revised by the New Directive on Work-Life Balance for Parents and Carers) provides protections against discrimination on the grounds of sex in regards to dismissals, access to employment and access to vocational education and training. In addition, EU Directives 2000/43 and 2000/78 provides these protections against discriminatory practices on grounds related to racial or ethnic origin, disability, sexual orientation, religion or belief. In this context, it appears that there are cases where the regulatory systems learn from each other, such as in case of family responsibilities, however this could take some time. For example, ILO Convention N.156 of 1981, which is not ratified by Cyprus, provides protection for workers with family responsibilities. However, Cyprus, which transposed Directives 92/85[33] and 2010/18,[34] provides protection for mothers (i.e. biological mothers, mothers with an adopted child or under surrogate arrangements), married fathers and parents. Now Cyprus must implement the new 2019 Directive on Work-Life balance for Parents and Carers, which extends its protection to carers. There are also cases where the ILO has appeared cognitively closed and did not endorse standards from the EU, such as in case of age discrimination. As explained in chapter 5, direct or indirect discrimination based on grounds of age is prohibited under Directive 2000/78, which was implemented in Cyprus by Law 58(I)/2004. The EU Directive 2000/78 also adopted a two-fold test to distinguish discriminatory practice from difference of treatment ('objectively and reasonably justified by a legitimate aim' and 'the means of

[31] ECSR, 'Conclusions II, Statement of Interpretation on Article 1(2)', p.4.
[32] ILO Convention N.158, article 5(a).
[33] Law 100(I)/1997.
[34] Law 47(I)/2012.

achieving the aim are appropriate and necessary').[35] In contrast, the ILO places the ground of age in the ILO Recommendation N.202, which as a soft-law instrument facilitates the implementation of ILO Convention N.158. In this context, this thesis suggests that it is about time to fill this normative gap and ensure that age is included in ILO Convention N.158 as discriminatory grounds for dismissals. Otherwise, younger and older workers (in non-EU Member States) could be exposed to increased risk of unemployment and social exclusion. Furthermore, it appears that there are cases where individuals are not covered by Equality Directives 2000/43 and 2000/78, because there are practices that are not discriminatory and fall in the scope of 'difference in treatment' (such as in case of *Abercombie & Fitch Italia Srl*).[36] In such cases, individuals may struggle to access employment, which means it is crucial to ensure that individuals will have access to ALMPs and LLL so that they will be able to enter, re-enter or transition in the labour market, while guaranteeing an income through these transitions.

As explained in section 2.4.2, employment security systems aim to facilitate employment transitions, which might entail removal of job security, and social security systems act as a safety net through these transitions. In other words, social security responds to social risks (such as, unemployment, maternity, sickness) to ensure that individuals can obtain the wherewithal through transitions in the labour market. However, it seems that employment security and social security appear as distinct concepts in the UN/ILO human rights context. At international level, the UN human rights treaties enshrine the right to social security (e.g. ICESCR, CRPD),[37] whereas the ILO sets a baseline for social security standards.[38] However, the ILO provides a two-tier protection to convince States to comply with some of the minimum standards. To provide a brief reminder, the State can select the branches of ILO Convention N.102 and there is the basic instrument (ILO Convention N.102) and other specialized instruments (e.g. ILO Convention N.130 and N.121).

The ECtHR integrates contributory and non-contributory benefits in the spectrum of the right to property (A1P1 ECHR), because if functions only within a human rights framework. Nevertheless, the ECtHR established a set of controls for A1P1 ECHR (assertable right and proprietary interest),[39] however, the States have a wide margin of appreciation that could

[35] Ibid, article 6(1).
[36] Case C-143/16 *Abercrombie & Fitch Italia Srl v Antonino Bordonaro* [2017] OJ C300/4, paras.16,26.
[37] See more about the UN human right treaties and social security in section 3.3.1.
[38] See more about the ILO and social security regulation in section 3.3.
[39] *Stec and Others v. United Kingdom* App nos 65731/01 and 65900/01 (ECtHR, 12 April 2006), para.54.

substantially restrict the right to property (such as in the case of *Aldeguer Tomás v. Spain*).[40] The ESC/RSC, which enshrines the right to social security (article 12) and the ECSS (soft-law means of regulation), adopt norms that sometimes converge or diverge with ILO instruments. For example, the ESC/RSC converges with ILO Convention N.183, as they both cover the right of mother to return to work after maternity leave.[41] However, they diverge as to family responsibilities, because ILO Convention N.156 on Workers with Family Responsibilities covers 'responsibilities in relation to other members of their immediate family who clearly need their care or support', whereas the ECSS solely covers 'maintenance of children'.[42]

Furthermore, the EU social security regulation aims to coordinate divergent social security systems to facilitate transitions of individuals and their families in the EU labour market (article 45 TFEU), while respecting the 'internal differentiation' of each legal system. In this respect, EU social security coordination procedures have developed two major constraints. First, EU Regulation 883/2004 does not define unemployment and family benefits, which reflects the EU 'deficit' to set minimum standards for social security protection; and second, the conditions of nationality and residence act as restrictions in the facilitation of these transitions in the EU, because they act as prerequisites for granting social security benefits.[43] In the field of non-discrimination, it appears that the EU has set double standards for social security protection of individuals. As explained in section 5.4.2, EU Directive 2000/43 (race and ethnicity) and EU Directive 2006/58 (grounds of sex) explicitly protect the right to social security in their normative framework. Whereas, EU Directive 2000/78 just provides protection against discriminatory practices on grounds of sexual orientation, disability, age, religion or belief in relation to occupational social security schemes or entitlement to retirement or invalidity benefits.

The 'mixed legal system of Cyprus' complicates the relationship between labour and social security systems, because these two systems are regulated through different procedures, endorse different principles (civil law and common law traditions) and entail participation of different actors.[44] The Cypriot social security system appears functionally closed, because of

[40] *Stedman v. the United Kingdom* App no 29107/95 (ECtHR, 9 April 1997).
[41] ILO Convention N.183, article 8; ECS, article 8(2); RSC, article 8(2).
[42] ILO Convention N.156, article 1(2); ECSS, article 40.
[43] Regulation 883/2004 on the Coordination of social security systems, Regulation N.574/72 on the application of social security schemes to employed persons and their families moving within the Community, Regulation 1408/, Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
[44] Hatzimihail N., 'Cyprus as a mixed legal system' (2013) 6(1) *Journal of Civil Law Studies* 37, p.1.

the complicate way that it operates. It seems that Cyprus showed its cognitively open nature by recognizing the transnational legal systems in its constitutional order. However, it did not show the same enthusiasm to adopt all transnational social security standards at domestic level. Cyprus may have ratified the key UN human rights treaties on the right to social security (e.g. ICESCR, ESC/RSC),[45] however, it discretely selected which transnational minimum standards are encompassed in the normative content of social security. As explained in chapter 6, Cyprus: a) selected aspects of ILO Convention N.102 and from the specialized Conventions (N.121 and N.130);[46] b) did not ratify the European Convention on Social Security; and c) did not accept some provisions of ESC/RSC, which are related to social security.[47]

In this context, it is noteworthy that the transnational regulatory systems through their social security regulation (except from the European Code of Social Security (ECSS) that is a soft-law instrument), do not cover educational benefits. This seems to be a key normative gap as educational benefits could play a catalytic role in facilitating transitions in the labour market and mitigate the risk of exposing workers to dismissal. Hence, the Cypriot legal system develops its own procedures and communicates with the other transnational systems only through reflexive indirect means of regulation to regulate educational benefits – as prompted by the EU Social OMC. From a flexicurity perspective, social dialogue (either through meaningful negotiations or collective bargaining) could be used as way to convince the interested actors to invest and engage them more actively in the realization of ALMPs and LLL (such as, financial contributions).[48] Nevertheless, the CJEU established a key protection, by including individuals that serve traineeship or apprenticeship, in the scope of protection under Collective Redundancies Directive 98/59, regardless of the origin of funding of remuneration or the legal framework of the vocational training.[49]

The existing 'doctrinal divergences' between the systems of employment security and social security at multi-level contexts, as the theory of legal pluralism explains, could converge through procedural norms ('normative convergence').[50] In other words, hard-law and soft-law

[45] See more about UN human rights treaties and Cyprus in section 6.2.1.
[46] ILO official website, <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103070> accessed 3 August 2019.
[47] Laws 64/1967, 5/1975 and 203/1991 (ratified by Cyprus 7 March 1968); Law 27(III)/2000 and Law 17(III)/2011 (ratified by Cyprus 27 September 2000).
[48] Ibid.
[49] Case C-229/14 *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* [2015] OJ C294/11, para.50.
[50] Thomas C., 'Convergences and Divergences in International Legal Norms on Migrant Labor Chantal' (2011) 32 *Comparative Labour Law and Policy Journal* 404, p.440.

procedures can be complementary rather than contradictory. Following the UN maxim of 'human rights are universal, interdependent and indivisible',[51] this thesis suggests that systems could converge through soft-law reflexive mechanisms. It is remarkable that the UN/ILO and the EU share the same development plan of SDGs.[52] SDGs and the Decent Work Agenda (DWA) promote labour and social security standards that could be endorsed at national level. However, it appears that even SDGs provide labour-related human rights-based approach, SDG 8 on decent work is focused on employability (as a way to increase economic growth) rather than on employment security and does not seem to deal with job security protections.[53] It is interesting that the EU means of regulation shifted from hard-law to soft-law. The EES and Social OMC as 'mechanisms of interest coordination', could facilitate an interplay of different actors and ease power imbalances.[54] However, it appears that the EES, which endorsed in its core normative context the promotion of flexicurity, and the Social OMC have turned from reflexive to 'dry' bureaucratic processes.

As a concluding remark, regulatory systems as autopoietic systems, which combine the features of cognitive openness and functional closure, develop their own procedures. Cyprus showed its strong prevalent capacity to self-regulate employment security and social security systems. As Cyprus gradually enters the recovery phase, Cyprus has taken significant steps, such as the launch of NHS and the adoption of MGI.[55] However, more need to be taken to ensure that individuals can swiftly transition in the labour market, such as to include unmarried fathers in the scope of Paternity Law.[56] In terms of distinction between employees and self-employed workers, it is crucial to ensure through collective bargaining that these two categories, which pay different percentage of contributions to the Social Insurance Authorities (i.e. salaried workers (7.8%)[57] and self-employed workers (14.6%))[58] are not blurred, because such practice could leave workers exposed to increased risk of social exclusion and poverty.

[51] Baderin M. and McCorquodale R., *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007), p.6.
[52] EU, Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, 'The new European consensus on Development: Our world, our dignity, our future' <https://ec.europa.eu/europeaid/sites/devco/files/european-consensus-on-development-final-20170626_en.pdf> accessed 5 August 2019.
[53] See more about SDGs and Decent Work Agenda in section 3.4.
[54] Rogowski R. and Wilthagen T., *Reflexive Labour law* (Kluwer Law and Taxation Publishers 1994), pp.7-8.
[55] See more about NHS (or GESY) and MGI in section 6.5.
[56] Paternity Law 117(I)/2017; *President of the Republic v. House of Parliament* (6/2/2019) App N.2/2018 and 3/2018.
[57] Social Insurance Law 59(I)/2010, article 5(1).
[58] Ibid, article 12.

In conclusion, this thesis has considered the Cypriot system's reflexive regulation of employment security and social security with reference to international and European norms in other systems. It tells a tale of normative communication but also divergence. There are important choices ahead for Cypriot government and the social partners in developing a future legal and practical framework which meets the needs of the country post-austerity. Procedural reflexive mechanisms like the EES and Social OMC may enable reflection on these options and improvement of domestic employment and social policy.

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